CHAPTER 4

COLLECTIVE BARGAINING

4-1. Introduction.

a. Collective Bargaining.

Once certified as an exclusive representative, the union will want to negotiate a collective bargaining agreement (CBA). A CBA is a contract negotiated by representatives of management and the exclusive representative. The contract is binding upon all parties: management, union, and employees. It signifies that management and the union have agreed upon terms and conditions of employment for employees in the bargaining unit.

b. Typical Clauses Contained in Bargaining Agreements.

While there is wide variation in the number, size, and wording of contract clauses, there are some similarities in their scope and content. The following examples illustrate a few matters frequently contained in agreements negotiated in the federal government. Of course, a CBA addresses many more matters. These are included merely to familiarize a reader who has never seen one with matters that they contain.

Parties. The first clause appearing in most collective bargaining agreements identifies the parties to the contract. For the union, the agreement may be signed by representatives of the national union, the local union or both. Management may prefer that both the national and the local unions sign so that both may be liable for contract violations. The agency may sign as a single employer or as a group representative of several government employers.

Recognition and Scope. In most contracts, an acknowledgment is included that the union is the exclusive and sole collective bargaining agent for all employees in the unit.

Management Rights. A statement of management rights is contained in contracts. This clause delineates the areas reserved solely to management by law. Management rights will be discussed in greater detail later in this chapter.

Grievance and Arbitration. All agreements must include a negotiated grievance procedure, applicable only to the bargaining unit. The parties to the agreement negotiate the scope and coverage of the negotiated grievance procedure.

c. Negotiation of the Collective Bargaining Agreement.

Most installations have negotiation teams that consist of management personnel from the various installation staffs. Often the labor counselor is a member of the negotiation team. Even if not a member, the labor counselor is frequently called upon to render legal opinions concerning the requirement of management to negotiate various union proposals. The union will normally submit its proposals to management prior to negotiating. The team will discuss them and decide their positions with respect to each proposal. They may agree to some, others they will not agree to as proposed, others may be acceptable and they will agree to them if it becomes advantageous during the "give and take" of negotiations, and others they may feel are nonnegotiable and so won't discuss.

The subject matter of the first session with the union will be the establishment of the ground rules for the negotiations. This may include agreeing upon the time, date, and place of negotiations; whether or not the session will be open or closed; the order of business, who will be on the negotiation teams and who will be spokespersons; how often proposals will be tabled before impasse procedures are utilized; and whether the contract will be implemented while negotiability disputes are being decided by third parties. After the ground rules are agreed upon, the parties generally complete a memorandum of understanding (MOU) containing the provisions.

The parties then negotiate over their proposals and counter proposals. Neither side need agree to a proposal, but each must discuss it in good faith unless it falls outside the scope of bargaining. Section 7114(b) provides:

> (b) The duty of any agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation--
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> (1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;
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> (2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;
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> (3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;
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> (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--
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> (A) which is normally maintained by the agency in the regular course of business;
>
> (B) which is reasonably available and necessary for full and proper discussion, understanding, and

negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and

(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

Section 7103(a)(12) further defines collective bargaining as:

> . . . the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession (emphasis added).

The Federal Sector Labor-Management Relations Statute (FSLMRS), 5 U.S.C. §§ 7101-7135, imposes upon both unions and employers the obligation to bargain in good faith concerning conditions of employment. This obligation persists throughout the period of exclusive representation, not just when a collective bargaining agreement is being negotiated or renegotiated. Thus, if management wants to change a condition of employment, such as the working hours, it must give the unions notice of the projected change and an opportunity to negotiate. This is addressed in more detail later in this chapter.

d. Official time, travel, and per diem for union negotiators.

5 U.S.C. § 7131 clearly provides that employees representing an exclusive representative in the negotiation of a collective bargaining agreement and other representational functions shall be authorized official time, that is, time away from their normal job, to accomplish these functions. Functions for which official time have been mandated by the FLRA include, but are not limited to: negotiating a collective bargaining agreement, impasse proceedings, midterm and impact and implementation negotiations, grievance proceedings and EEO complaints. Employees negotiating local supplements to national master agreements are also entitled to official time. American

Federation of Government Employees v. Federal Labor Relations Authority, 750 F.2d 143 (D.C. Cir. 1984).

Activities performed by employees relating to internal union business of a labor organization shall be performed during the time the employee is in a non-duty status. Internal union business, under section 7131, is construed to include little more than solicitation of union membership, election of labor organization officials, and collection of union dues. Also, official time may not be granted an employee during other than normal duty hours. This means that no overtime will be paid to allow employees to perform representational activities, because the FSLMRS limits official time to those times the employee would otherwise be in a duty status. Finally, official time may not be allowed for employees outside the bargaining unit for which a CBA is being negotiated. National Oceanic and Atmospheric Administration, 15 FLRA 43 (1984); AFGE v. FLRA, 744 F.2d 73 (10th Cir. 1984).

One area of dispute is over which employees are covered by Section 7131(a). The statute defines those covered as "any employee representing an exclusive representative in the negotiation of a collective bargaining agreement . . . ." Understandably, unions have attempted to expand the categories of employees covered. In Naval Surface Weapons Center, 9 FLRA 193 (1982), *reconsidered*, 12 FLRA 731 (1983), *aff'd*, AFGE, Local 2090 v. FLRA, 738 F.2d 633 (4th Cir. 1984), the union was the exclusive representative at two separate activities located at the Naval Center in Dahlgren, Virginia. The two activities, U.S. Naval Space Surveillance Systems (USNSSS) and U.S. Naval Surface Weapons Center (Weapons Center), held separate contract negotiations with the union. In a negotiation with USNSSS, the union Executive Vice President, an employee of the Weapons Center, served as Chief Negotiator.

USNSSS refused to grant to the union representative official time during the collective bargaining negotiations, arguing the representative was not a bargaining unit employee. The FLRA agreed with USNSSS, denying the union representative official time. The FLRA determined the official time entitlement under section 7131(a) accrues only to an employee who is within the bargaining unit involved in the negotiation. The union challenged the decision in the Court of Appeals for the Fourth Circuit, asserting that under Section 7131(a), any employee representing the union was entitled to official time. Seizing on the word "any," the union claimed the union representative was entitled to official time, even though he was not a bargaining unit employee. The court, however, affirmed the decision and reasoning of the FLRA. An employee is only entitled to official time if he is a member of the bargaining unit he is negotiating for and an employee of the agency he is negotiating with.

In HHS, Social Security Administration, 46 FLRA 1118 (1993), the agency challenged an arbitrator's decision granting union representatives official time for attendance at a national conference. The arbitrator granted official time for convention activities that were related to general labor relations matters. The FLRA upheld the arbitrator's decision, finding union officials attendance in meetings regarding general

labor relations matters was not internal union business but representational activities. Consequently, official time was authorized for some of the activities at the convention.

Section 7131(a) equalizes the number of union negotiators on official time to the same number of management negotiators. In the Authority's judgment, however, this section does not absolutely limit the union to the same number of negotiators, but in fact allows them to bargain for additional negotiators on official time. Such bargaining is allowed because, according to the FLRA, section 7131(d) expressly provides that official time must be granted by an agency for any employee representing a union in any amount the parties agree to be reasonable, necessary, and in the public interest. EPA and AFGE, 15 FLRA 461 (1984). The Office of Personnel Management (OPM) and Department of the Army did not agree with this holding or its rationale. OPM's position was set forth in FPM Bulletin 711-93, December 19, 1984, SUBJECT: Negotiability of Number of Union Negotiators on Official Time [the FPM was sunset on 31 Dec. 1993, including this letter], and it cites AFGE Local 2090 v. FLRA, 738 F.2d 633 (4th Cir. 1984) in support of its view. In this case, the Fourth Circuit held that sections 7131(a) (b) and (c) deal with official time for employee contract negotiators, while section 7131(d) allows the employer to negotiate for other types of official time allowances (e.g., grievance processing or investigation).

OPM also required that employers record the time and cost involved in employee representational functions. FPM Letter 711-161, July 31, 1981, SUBJECT: Recording the Use of Official Time by Union and Other Employee Representatives for Representational Functions, required agencies to initiate methods to record or account for the use of official time. The purpose of this requirement was to record travel and per diem costs when payable, assess the impact on agency operations of official time, and to determine changes that should be sought concerning official time in future negotiated contracts. While agencies cannot intimidate, harass or take other adverse action against union representatives for their use of official time to perform representational functions, agencies can and should monitor the use of official time to insure it is only being granted for proper purposes. Defense General Supply Center, 15 FLRA 932 (1984); Air Force Logistics Command, 14 FLRA 311 (1984). Although the FPM was sunset on 31 Dec 1993, policies provided for in the FPM prior to sunset may now appear in agency regulations.

Prior to 1983, the FLRA had always maintained that employees on official time away from their normal place of duty were entitled to payment of travel and per diem because labor-management negotiations qualify as "official business" within the meaning of the Travel Expense Act, 5 U.S.C. § 5702. This position was unanimously rejected by the Supreme Court in Bureau of Alcohol, Tobacco, and Firearms v. FLRA, 464 U.S. 89 (1983).

(1) Payment of per diem. Since BATF, the Authority has ordered agencies to pay travel and per diem for employee representatives appearing before the FLRA. *See* Dep't of the Air Force, Sacramento Air Logistics Center, 26 FLRA 674 (1987). The FLRA opined it had authority to order such payments pursuant to 5 U.S.C. § 1731(c) and the implementing regulation, 5 C.F.R. § 2429.13 (1988). In 1989, the Air

Force challenged the Authority's ability to order such payments. Dep't of the Air Force v. FLRA, 877 F.2d 1036 (D.C. Cir. 1989).

The FLRA asserted that a review of the previous executive orders and legislative history of the Act indicated that Congress intended such payment. Additionally, the appearance of employee before the FLRA was necessary for the Authority to carry out its Congressional mandate. Consequently, the employee was performing a "public function" and should be granted travel and per diem.

In rejecting the FLRA's arguments, the Court stated: "If anything, the fact that the Authority called the witness might suggest that it ought to bear his expenses, a practice apparently followed by the National Labor Relations Board in unfair labor practice proceedings . . ." *Id.*, at 1041. The Court found that the regulation was without statutory basis, reversing the Authority's decision and practice.

(2) Bargaining of per diem. While the FLRA cannot order an agency to pay travel and per diem under Sections 7131(a) or (c), the authority can require agencies to bargain over such payments. The scope of this bargaining, however, is limited.

The FLRA held that travel and per diem expenses for union negotiators is a mandatory topic of bargaining. NTEU and Customs Service, 21 FLRA 6 (1986). This position was sustained by the D.C. Cir. in U.S. Customs Service v. FLRA, 836 F.2d 1381 (D.C. Cir. 1988). The Court deferred to the Authority regarding the scope of bargaining. The Authority opined that because the determination of "official business" is highly discretionary, a union should be permitted to negotiate a provision regarding the exercise of that discretion. *See also*, AFGE and DOL Mine Safety & Health Admin., 39 FLRA 546 (1991).

Pursuant to the Travel Expense Act (TEA)(1975 Amendments, 89 Stat. 84, PL 94-22 May 19, 1975) and Federal Travel Regulations (FTR), travel and per diem may only be awarded when the travel is due to official business - that is for the "convenience" or "primary interest" of the government. Consequently, an agency cannot negotiate a provision that would authorize payment in cases where the travel is not for official business. A union could negotiate a provision requiring the agency to give the benefit of doubt to the employee, resulting in more determinations of "official business." Such a provision would not violate either the TEA or FTR.

(3) Other Official Time

Unions have unsuccessfully attempted to expand the coverage of 5 U.S.C. 7131(a) to grievances hearings and statutory appeals. If successful, a union could insist the number of union representatives present at a hearing equal the number of management representatives. Moreover, a union member would be entitled to official time for its representatives.

In Dept. of the Air Force, Randolph Air Force Base and AFGE, 45 FLRA 727 (1992), the union argued it was entitled to two representatives on official time at an arbitration hearing because management had two representatives. In support of this argument, the union cited 7131(a). The FLRA rejected the union's interpretation of the statute, finding the provision clear on its face. The FLRA declined to expand the requirement for equal representation beyond the words of the statute - "negotiation of a collective bargaining agreement." Because arbitration is not part of the collective bargaining procedure, the FLRA found the union was not entitled to official time or equal representation. The FLRA noted that such representation and official time is negotiable under Section 7131(d). In this case, the union had negotiated official time for one representative. If the union wanted to increase that number, it would have to renegotiate the collective bargaining agreement.

In I.N.S. v. FLRA, 4 F.3d 268 (4th Cir. 1993), INS attempted to limit Section 7131(d) to the two circumstances enumerated in the statute: (1) an employee representing an exclusive representative; and, (2) an employee acting in connection with any matter covered by Chapter 71. The court rejected that narrow reading of the statute, finding proposals to authorize official time for statutory appeals and preparing unfair labor practices negotiable.

In VA Regional Office, Atlanta, GA, 47 F.L.R.A. 1118 (1993), the FLRA found a proposal authorizing official time for lobbying Congress negotiable. The Authority determined because Congress had the power to regulate wages and benefits of federal employees, the unions lobbying actions were in their representational capacity. Therefore, the agency must negotiate the official time proposal for lobbying under Section 7131(d). However, this rule does not apply in the Department of Defense. Relying on a provision in the 1996 DoD Appropriation Act, the FLRA found no unfair labor practice when a DoD agency refused to allow union representatives to use paid official time to lobby Congress in support of or in opposition to pending or desired legislation. Office of the Adjutant General, Georgia Department of Defense and Georgia State Chapter Associations of Civilian Technicians, 54 FLRA No. 70 (1998); Georgia State Chapter of Civilian Technicians v. FLRA, 184 F.3d 889 (D.C. Cir. 1999) (denying the petition for judicial review because the union failed to counter the Defense Department's contention that the Appropriations Act rendered the contractual provisions unenforceable in its case before the FLRA). *See also* Granite State Chapter, Association of Civilian Technicians v. FLRA, 173 F.3d 25 (1st Cir. 1999) (finding that DoD Appropriation Act was a clear and manifest expression of Congress' intent to repeal union's right to lobby).

4-2. Scope of Bargaining.

There has been substantial resistance to negotiation of collective bargaining agreements by public employees.

President Franklin D. Roosevelt declared:

> All government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussion with government employee organizations. The employer is the whole people who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employees alike are governed and guided, and in many cases, restricted, by laws that establish policies, procedures, or rules in personnel matters. *See* Rosenman, The Public Papers and Addresses of Franklin D. Roosevelt, 1937, Vol. 1, p. 325 (1941).

President Roosevelt felt collective bargaining had no place in the public sector. Although collective bargaining does take place, it is restricted because it is recognized that public employees provide essential services and that there should be no bargaining over matters that go to the heart of providing these services.

Management is required to bargain only over conditions of employment. They are defined in section 7103(a)(14):

> conditions of employment mean personnel policies, practices, and matters, whether established by rule, regulations, or otherwise, affecting working conditions . . . .

There are certain conditions of employment which management may not negotiate. These are known generally as "management rights." Section 7106(a) defines some of the management rights as prohibited subjects of bargaining:

> (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
>
> (2) in accordance with applicable laws--
>
> > (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
> >
> > (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;
> >
> > (C) with respect to filling positions, to make selections for appointments from--
> >
> > > (i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

Management has no authority to negotiate the above areas. If a provision in the agreement deals with them, it will generally be given no effect, regardless of when discovered.

Section 7106(b)(1) enumerates several areas which management may, under the statute, choose to negotiate or may decline to negotiate. It is management's discretion. These permissive/ optional areas are:

> On the numbers, types, and grades of employees or positions assigned to any organization subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

Finally, sections 7106(b)(2) and (3) provide an exception to the management rights for proposals which address how management officials will exercise any authority reserved to them under the Statute, or appropriate arrangements for employees adversely affected by the exercise of any such authority. This is known as impact and implementation bargaining.

The FSLMRS often leaves the scope of bargaining unclear, so negotiability disputes arise. If management declares the proposal nonnegotiable, the exclusive representative may file an unfair labor practice for failure to bargain in good faith. As an alternative to filing an unfair labor practice, the exclusive representative may appeal management's non-negotiability declaration to the Authority, asking for a negotiability determination. This latter procedure is preferred. If the complainant should choose the wrong procedure, negotiability determination vs. unfair labor practice, the Authority will refuse jurisdiction and direct the complainant to the proper forum. *See* OPM, 6 FLRA 44 (1981).

New rules went into effect on 1 April 1999 to determine issues of negotiability. *See* 5 CFR 2424. Under these new procedures, a union must first submit an actual proposal (contract language not yet agreed on) to the agency or receive an unrequested written allegation concerning the duty to bargain from the agency before the Authority will undertake a negotiability determination. Within 15 days of receipt of the agency head’s disapproval of a proposal or receipt of an agency’s written allegation that a proposal is not within the duty to bargain, the exclusive representative may file a petition for review with the FLRA. Only an exclusive representative that is a party to the negotiations may file such a petition. In filing a petition for review, the union is placing the agency on notice that it is requesting the FLRA to hold that the proposal is either within the duty to bargain or not contrary to law.

On receipt of the petition for review, the FLRA may schedule a post-petition conference. All reasonable efforts will be made to schedule the conference within 10 days of receipt of the petition. Such a conference may be conducted in person or via the telephone. Within 30 days from the receipt of the union's petition, the agency must submit its response to the FLRA. Generally, the purpose of the agency response is to inform the FLRA and the exclusive representative why a proposal or provision is not within the duty to bargain or contrary to law. The exclusive representative may file a brief rebuttal to the agency's response within 15 days of receipt. The agency may file an additional reply to the union's rebuttal, also within 15 days of receipt. Following all submissions, and after a hearing (if deemed necessary by the Authority), the FLRA renders its decision. If the FLRA determines something to be legal and within the duty to bargain, it will issue an order to bargain over the proposal or an order to rescind an agency head's disapproval of the provision. However, should the FLRA determine that a proposal or provision is not negotiable because it's illegal or there is not otherwise a duty to bargain, it will dismiss the petition. Either party may appeal the decision to a U.S. court of appeals within 60 days from the date the order was issued. *See* Guide to the FLRA Negotiability Appeals Process, http://www.flra.gov/reports/ng_guide.html.

If there is no dispute as to the negotiability of the proposal, but the parties cannot reach agreement, impasse procedures are utilized. These are discussed in Chapter 5.

The duty to negotiate is continuous and does not end when the collective bargaining agreement (CBA) is signed. If management desires to change a provision of the CBA, the union's consent is required. If a decision is to be made which falls within the scope of the bargaining but is not addressed in the agreement, the union must be given notice and an opportunity to negotiate. If the union indicates its does not desire to negotiate the matter or fails to respond within a reasonable time, management may implement the decision. If the union desires to negotiate the matter, there must be agreement or negotiation to impasse must result.

When a proposal or decision deals with an area which appears to be nonnegotiable but is not obviously so, the labor counselor will be expected to render a legal opinion as to its negotiability.[1] Consult the FSLMRS, decisions of federal courts, and the FLRA to determine if the issue has been addressed and a precedent exists, realizing that these decisions are very much fact specific.

The following cases and materials consider the subject-matter scope of collective bargaining in the Federal sector. What the parties must do to fulfill their obligation to negotiate will be considered in an unfair labor practice context in Chapter Five. In deciding negotiability cases, the Authority looks to the express terms of the FSLMRS, its legislative history, its prior decisions and, most importantly, to the facts of the case.

1 Major Holly O'Grady Cook, Labor and Employment Law Note, *To Talk or Not to Talk: How Do You Know Whether an Issue is Negotiable?,* ARMY LAW., Mar. 2000, at 21.

4-3. Negotiability of Particular Subjects.

a. Conditions of Employment.

As previously discussed, management need only negotiate conditions of employment affecting bargaining unit employees to the extent consistent with Federal law, government-wide regulations, and agency regulations for which a compelling need exists. The labor counselor's first inquiry should be whether or not the proposal has a direct and substantial impact on a condition of employment. If it does not, the matter need not be negotiated. Of course, management may negotiate the matter if it so desires provided it is not a section 7106(a) prohibited subject of bargaining (discussed infra). The following case is illustrative of several of these provisions.

ANTILLES CONSOLIDATED EDUCATION ASSOCIATION Union and ANTILLES CONSOLIDATED SCHOOL SYSTEM Agency

22 FLRA 335 (1986)

(Extract)

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute), concerning the negotiability of one five-part Union proposal.

II. Union Proposal

Article 36. BASE/POST PRIVILEGES

1. All unit employees will be granted the use of the following base/post facilities:

A. Base/Post Exchanges at the site to which the employee is assigned.

B. All retail food outlets operated by the Navy Exchange, AAFES, or Coast Guard Exchange at the site to which the employee is assigned, or

C. Access to the nearest exchange system and its retail food outlets in any case in which an employee is assigned to a site at which the facilities described in subsection A and B are not operated.

D. Base/post/station/fort special services recreation and morale support facilities at the site to which the employee is assigned.

E. Hospital facilities on a paid basis.

A. Position of the Parties

The Agency asserts that the proposal is nonnegotiable for four reasons: (1) it does not concern matters affecting working conditions of bargaining unit employees, within the meaning of section 7103(a)(14) of the Statute; (2) the Agency is without authority to bargain over the proposed benefits; (3) bargaining on the proposal is barred by regulations for which a compelling need exists; (4) negotiation on parts D and E of the proposal is foreclosed by applicable law.

The Union did not provide any arguments in its petition for review supporting the negotiability of the proposal, nor did it file a reply brief.

We will examine the Agency's contentions, in turn.

B. Analysis

1. Conditions of Employment of Bargaining Unit Employees

Under the statutory scheme established by sections 7103(a)(12), 7106, 7114 and 7117 a matter proposed to be bargained which is consistent with Federal law, including the Statute, Government-wide regulations or agency regulations is, nonetheless, outside the duty to bargain unless such matter directly affects the conditions of employment of bargaining unit employees. The term "conditions of employment" is defined in section 7103(a)(14) as "personnel policies, practices, and matters whether established by rule, regulation, or otherwise, affecting working conditions . . ."

In deciding whether a proposal involves a condition of employment of bargaining unit employees the Authority considers two basic factors:

(1) Whether the matter proposed to be bargained pertains to bargaining unit employees; and

(2) The nature and extent of the effect of the matter proposed to be bargained on working conditions of those employees.

For example, as to the first factor, the question of whether the proposal pertains to bargaining unit employees, a proposal which is principally focused on nonbargaining unit positions or employees does not directly affect the work situations or employment relationship of bargaining

unit employees. *See* National Federation of Federal Employees, Local 1451 and Naval Training Center, Orlando, Florida, 3 FLRA 88 (1980) *aff'd sub nom.* National Federation of Federal Employees v. FLRA, 652 F.2d 191 (D.C. Cir. 1981) (Proposal requiring management to designate a particular number of representatives to negotiations was held to be outside the duty to bargain). But, a proposal which is principally focused on bargaining unit positions or employees and which is otherwise consistent with applicable laws and regulations is not rendered nonnegotiable merely because it also would have some impact on employees outside the bargaining unit. *See* Association of Civilian Technicians, Pennsylvania State Council and Pennsylvania Army and Air National Guard, 14 FLRA 38 (1982) (Union Proposal 1 defining the competitive area for reduction-in-force as coextensive with the bargaining unit was held to be within the duty to bargain even though it had an impact on nonbargaining unit employees).

Part 1 of the Appendix to this decision references other Authority decisions concerning the nature and extent of the affect of a proposal on bargaining unit employees.

As to the second factor, relating to the effect of a proposal on working conditions, the question is whether the record establishes that there is a direct connection between the proposal and the work situation or employment relationship of bargaining unit employees. For example, a proposal concerning off-duty hour activities of employees was found to be outside the duty to bargain where no such connection was established. *See* International Association of Fire Fighters, AFL-CIO, CLC, Local F-116 and Department of the Air Force, Vandenberg Air Force Base, California, 7 FLRA 123 (1981) (Proposal to permit employees to utilize on-base recreational facilities during off-duty hours found not to concern personnel policies, practices, or matters affecting working conditions of bargaining unit employees).

On the other hand, a proposal concerning off-duty hour activities of employees was held to affect working conditions of bargaining unit employees where the requisite connection was established. National Federation of Federal Employees, Local 1363 and Headquarters, U.S. Army Garrison, Yongsan, Korea, 4 FLRA 139 (1980) (Proposal to revise the agency's "ration control" policy was found to concern standards of health and decency which were conditions of employment under agency regulations).

Part 2 of the Appendix to this decision references other Authority decisions concerning the nature and effect of a proposal on bargaining unit employees' working conditions.

Applying the first factor to the disputed proposal we find that the proposal expressly pertains only to bargaining unit employees. No claim is made that the proposal has any impact on nonbargaining unit employees. However, we must also assess the nature and effect of the proposal on bargaining unit employees' working conditions under the second factor. Here the Agency argues without contravention that access to the retail, recreational and medical facilities denoted in the proposal would occur primarily during the employees' non-duty hours. Further, the Union has provided no evidence, whatever, and the record does not otherwise establish that access to the facilities in question is in any manner related to the work situation or employment relationship or is otherwise linked to the employees' assignments within the school system in Puerto Rico. As a result we find the disputed proposal is to the same effect as the proposal permitting employees to use on-base recreational facilities during off-duty hours found outside the agency's obligation to bargain in Vandenberg Air Force Base, 7 FLRA 123 (1981). Thus, the disputed proposal also does not directly affect working conditions of bargaining unit employees and is outside the Agency's obligation to bargain.

2. Matters within the Agency's Authority to Bargain

It is well established that the duty of an agency under the Statute is to negotiate with an exclusive representative of an appropriate unit of its employees concerning conditions of employment affecting them to the extent of its discretion, that is, except as provided otherwise by Federal law including the Statute, or by Government-wide rule or regulation or by an agency regulation for which a compelling need exists. For example, *see* National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 FLRA 769 (1980), *aff'd sub nom.*, National Treasury Employees Union v. FLRA, 691 F.2d 553 (D.C. Cir. 1982).

It is also well established that an agency may not foreclose bargaining on an otherwise negotiable matter by delegating authority as to that matter only to an organizational level within the agency different from the organizational level of recognition. Rather, under section 7114(b)(2) of the Statute, an agency is obligated to provide representatives who are empowered to negotiate and enter into agreement on all matters within the statutorily prescribed scope of negotiations. American Federation of Government Employees, AFL-CIO, Local 3525 and United States Department of Justice, Board of Immigration Appeals, 10 FLRA 61 (1982) (Union Proposal 1). Thus, the Agency's claim that the Superintendent of the Department of Navy Antilles School System is without authority to bargain on access to Navy retail, recreational or medical facilities because such facilities are in separate chains of command within the Department of Navy from the school system cannot be sustained. *See* American Federation of Government Employees, AFL-CIO, Local 1409 and U.S.

Adjutant General Publications Center, Baltimore, Maryland, 18 FLRA No. 68 (1985). Similarly, the Agency's argument that the Superintendent is without authority to bargain on access to Army facilities, which are under the jurisdiction of a separate subdivision of DOD, also cannot be sustained. *See* Defense Contract Administration Services Region, Boston, Massachusetts, 15 FLRA 750 (1984).

As to Coast Guard facilities, there is nothing in the record in this case which indicates that the Agency lacks the discretion to at least request the Department of Transportation to extend access to such Coast Guard facilities to Antilles School System employees. Thus, the Agency is obligated to bargain on access to Coast Guard facilities to this extent. *See* American Federation of State, County and Municipal Employees, AFL-CIO and Library of Congress, Washington, D.C., 7 FLRA 578 (1982) (Union proposals XI-XVI), *enf'd sub nom.*, Library of Congress v. FLRA, 699 F.2d 1280 (D.C. Cir. 1983).

3. Compelling Need (omitted)

4. Consistency with law of Parts D and E of the Proposal

a. Part D of the Proposal

According to the record this part of the proposal would permit the Antilles School System employees to patronize on-post retail liquor stores. While the Agency's claims that Puerto Rico law precludes the sale of Commonwealth tax-free alcoholic beverages to these civilian employees we find such claim unsupported in the record. That is, the DOD regulations, which were included in the record by the Agency, specifically permit patronage of on-post retail liquor stores by other categories of persons, such as dependents of military personnel, who, like the civilian employees in this case, are not expressly listed as exempt under the Puerto Rico Statute. *See* Puerto Rico Laws Annotated tit. 13 § 6019 (1976). Thus, we do not find that the Agency has established that Part D of the proposal is inconsistent with law.

b. Part E of the Proposal

Part E of the proposal would permit employees to use the local Navy hospital on a paid basis. However, under 24 U.S.C. § 34 Federal employees located outside the continental limits of the United States and in Alaska may receive medical care at a naval hospital only "where facilities are not otherwise available in reasonably accessible and appropriate non-Federal hospitals." Also, under 24 U.S.C. § 35, such employees may be hospitalized in a naval hospital "only for acute medical and surgical conditions . . . ." Since Part E of the proposal contains no

limitations on access to the local naval hospital, it is inconsistent with the express statutory provisions governing such access.

C. Conclusion

The Authority finds, for the reasons set forth in the preceding analysis, that the entire proposal in this case concerns matters which are not conditions of employment of bargaining unit employees. Consequently, it is not within the duty to bargain although the Agency could negotiate on the proposal if it chose to do so, except for Part E.

Further, the Authority concludes that as Part E of the proposal is inconsistent with Federal law, it is outside the scope of the duty to bargain pursuant to section 7117(a)(1) of the Statute.

III. Order

Accordingly, pursuant to section 2424.10 of the Authority's Rules and Regulations, IT IS ORDERED that the petition for review be, and it hereby is, dismissed.

APPENDIX

Part 1

The following cases involve examples of proposals found outside the duty to bargain because of the impact on individuals or positions outside the bargaining unit.

National Council of Field Labor Locals, American Federation of Government Employees, AFL-CIO and U.S. Department of Labor, Washington, D.C., 3 FLRA 290 (1980) (Proposal I establishing the method management will use in filling supervisory and management positions found not to affect working conditions of bargaining unit employees).

American Federation of Government Employees, National Council of EEOC Locals No. 216, AFL-CIO and Equal Employment Opportunity Commission, Washington, D.C., 3 FLRA 504 (1980) (Proposal relating to the assessment and training of supervisors found not to affect working conditions of bargaining unit employees).

National Treasury Employees Union and Internal Revenue Service, 6 FLRA 522 (1981) (Proposal VI requiring management to notify individuals who telephone the agency for tax information that such calls are subject to monitoring found not to affect working conditions of bargaining unit employees).

National Association of Government Employees, Local R7-23 and Headquarters, 375th Air Base Group, Scott Air Force Base, Illinois, 7 FLRA 710 (1982) (Proposal concerning discipline of management officials and supervisors found not to affect working conditions of bargaining unit employees).

American Federation of Government Employees, AFL-CIO, Local 2272 and Department of Justice, U.S. Marshals Service, District of Columbia, 9 FLRA 1004 (1982) (The portion of Proposal 5 which required management to prosecute private citizens who file false reports found not to affect working conditions of bargaining unit employees).

Association of Civilian Technicians, State of New York, Division of Military and Naval Affairs, Albany, New York, 11 FLRA 475 (1983) (Proposal 2 concerning procedures for filling military positions found not to affect the working conditions of bargaining unit employees).

American Federation of Government Employees, AFL-CIO, Local 2302 and U.S. Army Armor Center and Fort Knox, Fort Knox, Kentucky, 19 FLRA 778 (1985) (Proposal 4 prescribing the content of certain management records relating to employees, the manner in which such records are maintained and restrictions on management access to such records found not to affect working conditions of bargaining unit employees).

Part 2

A. The following cases involve examples of proposals found outside the duty to bargain because of the absence of a direct affect on bargaining unit employees' working conditions.

National Association of Air Traffic Specialists and Department of Transportation, Federal Aviation Administration, 6 FLRA 588 (1981) (Proposal IV permitting employee allotments from pay for "Political Action Fund" to be used in "political efforts to improve working conditions" found to affect working conditions in only a remote and speculative manner).

National Federation of Federal Employees, Council of Consolidated Social Security Administration Locals and Social Security Administration, 13 FLRA 422 (1983) (Proposals 3 and 4 requiring management to utilize recycled paper products and to provide the union with such recycled paper products upon request found not to directly affect bargaining unit employees' working conditions as there was no demonstration in the record of any such effect).

Maritime Metal Trades Council and Panama Canal Commission, 17 FLRA 890 (1985) (Proposals 1 and 2 permitting employees to cash personal checks at the agency's treasury found not to directly affect working conditions of bargaining unit employees).

B. The following cases involve examples of proposals found to directly affect working conditions of bargaining unit employees.

American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604 (1980) (Union Proposal 1), *enf'd as to other matters sub nom.,* Department of Defense v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981), *cert. denied sub nom.,* AFGE v. FLRA, 455 U.S. 945 (1982) (A proposal to establish a union operated day care facility on agency property was found to directly affect bargaining unit employees by enhancing an individual's ability to accept employment or to continue employment with the agency and to promote workforce stability and prevent tardiness and absenteeism).

National Treasury Employees Union and Internal Revenue Service, 3 FLRA 693 (1980) (Union Proposal I establishing criteria for approval of outside employment was found to directly affect working conditions of unit employees because agency regulations which set forth policies governing outside employment were determinative of employee eligibility for certain positions and even prescribed whether employees could continue to be employed).

Planners, Estimators and Progressmen Association, Local No. 8 and Department of the Navy, Charleston Naval Shipyard, Charleston, South Carolina, 13 FLRA 455 (1983) (A proposal to permit bargaining unit employees to record their time and attendance manually instead of mechanically through use of a time clock found to directly concern working conditions of such employees).

United States Department of Justice, United States Immigration and Naturalization Service and American Federation of Government Employees, AFL-CIO, Local 2509, 14 FLRA 578 (1984) (Assignment of Government-owned housing to employees was found to directly affect working conditions of bargaining unit employees in circumstances where there was a lack of adequate housing in the geographic area and the Government-owned housing in question was constructed for the benefit and use of employees stationed at the hardship location).

American Federation of Government Employees, AFL-CIO, Local 1770 and Department of the Army, Headquarters, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina, 17 FLRA 752 (1985) (Proposal 4 requiring the agency to provide lockers or other secure areas

for employees' personal items during working hours found to directly affect working conditions of unit employees).

The FLRA has followed the definition of "conditions of employment" set out in the above case. *See* AFGE and VA, 41 FLRA 73 (1991), and VA Medical Center, Leavenworth, Kansas, 40 FLRA 592 (1991).

b. Negotiating Matters Which Are Contrary to Federal Law, Government-wide Regulations or Agency Regulations-Prohibited Subjects (proposals which are not negotiable). Section 7117(a).

(1) Negotiating Proposals Which Contradict Federal Law.

A union proposal that is contrary to a statute is nonnegotiable. Management has no discretion to change the statute.

Examples include:

See the discussion of Part 4. of the Antilles case above.

In AFGE, Local 1547 and 56th Fighter Wing, Luke Air Force Base, 55 FLRA No. 121 (1999), the Authority held that a union proposal to require an agency to spend appropriated funds for motorcycle safety equipment was outside the duty to bargain because it violated federal statute.

In Fort Shafter, Hawaii, 1 FLRA 563 (1979), the Authority held that an agency shop proposal conflicts with 5 U.S.C. § 7102, which assures employees the right to form, join, or assist any labor organization, or to refrain from any such activity. The same result was reached in AFGE and McClellan Air Force Base, 44 FLRA 98 (1992).

Official time to prepare for "interface" activities does not constitute "internal union business," and conflict with 5 U.S.C. § 7131(b), the Authority held in Mather AFB, 3 FLRA 304 (1980) and ARRACOM, 3 FLRA 316 (1980). Consequently, proposals dealing with official time for preparing for negotiations, impasse proceedings, and counterproposals, are negotiable matters under section 7131(d). *See* Social Security Administration and AFGE, 13 FLRA 112 (1983).

In VA, Minneapolis and Farmers Home Administration, 3 FLRA 310 and 320 (1980), respectively, the Authority held that there was no requirement to expressly exclude from negotiated grievance procedures matters which, under provisions of law, may not be grieved under such procedures.

> [S]ection 7121 . . . already provides that negotiated grievance procedures cover, at a maximum, matters which under the provisions of law could be submitted to the procedures.

Veterans Administration was not required to bargain over union proposals creating grievance and arbitration procedures for medical professionals regarding allegations of inaptitude, inefficiency, or misconduct. 38 U.S.C. § 4110 provides exclusive disciplinary procedures to be followed. Veterans Admin. Med. Cntr., Minneapolis v. F.L.R.A., 705 F.2d 953 (8th Cir., 1983)(rehearing en banc denied). In Colorado Nurses Assoc. and VA Med. Center., Ft. Lyons, 25 F.L.R.A. 803 (1987) the Authority held that a union proposal to create a grievance and arbitration system, for matters not excluded by 38 U.S.C. § 4110, were bargainable.

The National Guard was not required to negotiate regarding union proposals that would allow binding arbitration of matters reserved for the exclusive review of the state adjutants general by the National Guard Technicians Act. State of Neb., Military Dept. v. F.L.R.A., 705 F.2d 945 (8th Cir., 1983).

A union proposal to require an agency to waive collection of interest and penalties on debts owed the government was held nonnegotiable in NFFE and Engineer District, Kansas City, 21 FLRA 101 (1986). The FLRA determined that the Federal Debt Collection Act of 1982 required such collections and did not grant agencies such discretionary authority.

In NFFE and DA, Moncrief Army Community Hosp., 40 FLRA 1181 (1991), the Authority held that the agency was not required to bargain over a union proposal that was inconsistent with federal law.

(2) Negotiating Proposals Which Contradict Executive Orders or Government-Wide Regulations.

If a proposal conflicts with an executive order or government-wide regulation, it is nonnegotiable. The rationale is that the agency cannot change these provisions. A government-wide regulation is one which is applicable to the Federal work force as a whole. Most of them (for Department of Defense) are regulations promulgated by the Office of Personnel Management or the General Services Administration.

The following case illustrates this rule.

N.T.E.U. and I.R.S.

3 FLRA 675 (1980)

(Extract)

Union Proposal

Pre-paid parking spaces for bargaining unit employees' private vehicles, at the New Orleans, Baton Rouge, Shreveport, Lake Charles, and Houma posts of duty, will not be released to the General Services Administration.

Question Here Before the Authority

The questions are, first of all, whether the union's proposal is inconsistent with applicable Government-wide regulations under section 7117(a) of the Statute; or secondly, whether the union's proposal concerns a matter which is negotiable at the election of the agency under section 7106(b)(1) of the Statute; or finally, whether the union's proposal violates sections 7106(a)(1) of the Statute.

Opinion

Conclusion: The union's proposal, insofar as it requires the agency to retain the disputed parking spaces, is consistent with applicable Government-wide regulations under section 7117(a) of the Statute, does not concern a matter which may be negotiated at the election of the agency within the meaning of section 7106(b)(1) of the Statute, and does not violate the agency's rights under section 7106(a)(1) of the Statute. However, to the extent that the proposal implicitly requires the agency to provide the parking spaces so retained free of charge to employees, it is inconsistent with applicable Government-wide regulations under section 7117(a) of the Statute. Accordingly, . . . the agency's allegation that the disputed proposal is not within the duty to bargain is sustained in part and set aside in part.

Reasons: Under the Statute, the duty of an agency to negotiate with an exclusive representative extends to the conditions of employment affecting employees in an appropriate unit except as provided otherwise by Federal law and regulation, including Government-wide regulation. That is, under the Statute, if a proposed matter relates to the conditions of employment of an appropriate unit of employees in an agency and is not inconsistent with law or regulation--i.e., is within the discretion of an agency--it is within the scope of bargaining which is required of that agency. In this case, the agency alleges, first of all, that the union's proposal is not within the duty to bargain because it is contrary to applicable Government-wide regulations. Specifically, the agency alleges that retention of the employee parking spaces which are the subject of the instant dispute conflicts with provisions of the Federal Property Management Regulations (FPMR).

The initial question is whether the provision of the FPMR (41 C.F.R. Subchapter D) at issue herein constitute a "Government-wide rule or regulation" within the meaning of the Statute. The phrase "Government-wide rule or regulation" is used in two different subsections of section 7117 of the Statute. First of all, as here in issue, it is used in section 7117(a) to state a limitation on the scope of bargaining; i.e., matters that are inconsistent with Government-wide rule or regulation are not within the duty to bargain. Secondly, it is used in section 7117(d) to state the right of an exclusive representative, in certain circumstances, to consult with respect to the issuance of such rules and regulations effecting any substantive change in any condition of employment. In neither of these contexts does the Statute precisely define what constitutes a "Government-wide rule or regulation" within the meaning of section 7117.

[The Authority discusses the legislative history of this section of the CSRA.]

Thus, Congress intended the term "Government-wide regulation" to include those regulations and official declarations of policy which apply to the Federal civilian work force as a whole and are binding on the Federal agencies and officials to which they apply.

However, while the legislative history of the term "Government-wide" indicates Congress intended that regulations which only apply to a limited segment of the Federal civilian work force not serve to limit the duty to bargain, it does not precisely define the outer limits of the reach required of a regulation in order for that regulation to be a "Government-wide" regulation within the meaning of section 7117. That is, it is unclear, for example, whether Congress intended that a regulation must apply to all employees in the Federal civilian work force in order to constitute a "Government-wide" regulation. In this regard, it is a basic rule of statutory construction that legislative enactments are to be construed so as to give them meaning. A requirement that a regulation apply to all Federal civilian employees in order to constitute a "Government-wide" regulation under section 7117 would render that provision meaningless, since it does not appear that there is any regulation which literally affects every civilian employee of the Federal Government. Furthermore, such a literal definition of the term would also render meaningless the concomitant right of a labor organization under section 7117(d) of the Statute in appropriate circumstances to consult with the issuing agency on Government-wide rules or regulations effecting substantive changes in any conditions of employment. In this regard, the legislative history of the Statute indicates that Congress intended the consultation rights provided in section 7117(d) to be substantial union rights.

* * *

The issue then becomes whether the union proposal in dispute herein is inconsistent with the provisions of the FPMR cited by the agency. In this regard, since GSA has primary responsibility for the issuance and interpretation of these regulations, the Authority requested an advisory opinion from GSA regarding whether any part of current FPMR would prevent an agency from providing free parking spaces for employee personally owned vehicles that are not used for official business.

* * *

In summary, GSA interprets applicable provisions of the FPMR, specifically, 41 C.F.R. § 101-17.2, as imposing upon an agency the obligation to relinquish space to GSA, including space for parking, after the agency determines that such space is no longer needed or is under-utilized. GSA also stated that this duty of an agency to relinquish space is contingent upon a determination by the agency that the space is no longer needed or is under-utilized. That is, according to GSA, under the FPMR, an agency has discretion to determine whether it needs, or is able to utilize, a given space. GSA then concluded, without citing any provision of the FPMR in support, that the agency could not make the requisite determination, i.e., exercise its discretion under the FPMR, through negotiations as provided by the union's proposal.

The Authority, for purposes of this decision, adopts GSA's conclusion that an agency is obligated to relinquish space to GSA, including space for parking, once the agency determines in its discretion, that such space is no longer needed or utilized. However, GSA's further conclusion that the agency could not exercise its discretion in this regard through negotiations with a union is without support. As stated at the outset of this decision, Congress, in enacting the Federal Service Labor-Management Relations Statute, established a requirement that an agency negotiate with the exclusive representative of an appropriate unit of its employees over the conditions of employment affecting those employees, except to the extent provided otherwise by law or regulation. That is, to the extent that an agency has discretion with respect to a matter affecting the conditions of employment of its employees, that matter is within the duty to bargain of the agency.

* * *

GSA also states, however, that even if the agency's decision to relinquish space is subject to the duty to bargain under the Statute, the agency would be precluded from agreeing to provide those spaces free of charge by provision of FPMR Temporary Regulation D-65 (Temp. Reg. D-65), 44 Fed. Reg. 53161 (1979). Specifically, under section 11 of this regulation, Federal employees utilizing government-controlled parking spaces shall be assessed a charge at a rate which is the same as the commercial equivalent value of those parking spaces. (Between

November 1, 1979, and September 30, 1981, however, the charge will be one-half of the full rate to be charged.) This regulation is presently in effect and applies to the parking spaces here in dispute. Further, based upon the analysis stated above, this regulation, which is generally applicable throughout the executive branch, is a Government-wide regulation within the meaning of section 7117 of the Statute and precludes negotiation on a conflicting union proposal. Thus, since the union proposal would require the agency to provide the disputed parking spaces free of charge to employees, it is inconsistent with FPMR Temporary Regulation D-65 and, to that extent, is outside the agency's duty to bargain under the Statute.

* * *

In summary, consideration of each of the grounds for nonnegotiability alleged by the agency leads to the conclusion that, for the foregoing reasons, the union's proposal, insofar as it would require the agency to retain the disputed parking spaces for employee parking is within the agency's duty to bargain under the Statute; but to the extent that it would require the agency to provide those spaces free of charge to employees, it conflicts with the currently applicable Government-wide regulation, namely, FPMR Temporary Regulation D-65 44 Fed. Reg. 53161 (1979), under section 7117(a) of the Statute, and thus, in that respect, is outside the agency's duty to bargain.

In NFFE and Dep't of the Army, U.S. Army Armament, Munitions and Chemical Command, Rock Island, Illinois, 33 FLRA 436 (1988), the Authority determined that the Mandatory Guidelines for Federal Workplace Drug Testing, issued by HHS, are a government-wide regulation. The Guidelines were issued in accordance with Executive Order No. 12564 and the 1987 Supplemental Appropriations Act. The Guidelines are binding on executive agencies, uniformed services and any other federal employing unit except the Postal Service and the legislative and judicial branches. *Remanded on other grounds* Dep't of the Army v. FLRA, 890 F.2d 467 (D.C. Cir. 1989), *decision on remand*, 35 FLRA 936 (1990).

Numerous union proposals have been found to be nonnegotiable because they are contrary to the provisions of the Mandatory Guidelines. In AFGE and Sierra Army Depot, 37 FLRA 1439 (1990) the union proposed (proposal 4) that employees who are unable to provide a sufficient amount of urine on the appointed day be allowed to return the next day for testing. The Authority found the proposal inconsistent with the Mandatory Guidelines and, therefore, nonnegotiable under section 7117(a)(1). The same result was reached in International Federation of Professional and Technical Engineers, Local 89 and Bureau of Reclamation, Grand Coulee Project Office, 48 FLRA 516, 530 (1993)(proposal IV.E.4). A union proposal to freeze any samples not tested

on the day collected was also found to be inconsistent with the government-wide regulation. *Id.,* at 529 (Proposal IV.E.2).

Effective date for Government-wide regulations.

> Under section 7117 of the Statute, Government-wide rules and regulations bar negotiation over and agreement to union proposals that conflict with them. Except for Government-wide rules or regulations implementing 5 U.S.C. § 2302, however, Government-wide rules or regulations do not control over conflicting provisions in a collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed. *See* 5 U.S.C. § 7116(a)(7). (citations omitted).

DA, Headquarters III Corps and Fort Hood and AFGE, 40 FLRA 636, 641 (1991). The Authority went on to say that the Government-wide regulations become enforceable, by operation of law, when the agreement expires. Negotiations or renewal of the CBA will not prevent the regulation or rule from coming into force.

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(3) Negotiating Proposals Which Contradict Agency Regulations-Compelling Need.

If the Union should advance a proposal which contradicts an agency's or its primary national subdivision's regulation or rule, management may assert that the proposal is nonnegotiable because there is a compelling need for the rule or regulation. The union may then petition the Authority, requesting that a compelling need determination be made. The Authority will review the facts and the parties' arguments, and apply its compelling need criteria to make a ruling.

5 U.S.C. § 7117 provides:

> (a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.
>
> (2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation . . . only if the Authority has determined under subsection (b) of this section that no compelling need exists for the rule or regulation.
>
> (3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency,. . .

(b)(1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority, whether such a compelling need exists.

(2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if--

(A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or

(B) the Authority determines that a compelling need for a rule or regulation does not exist."

The proper forum to address the question of compelling need is in a negotiability proceeding and not an ULP proceeding. FLRA v. Aberdeen Proving Ground, 485 U.S. 409 (1988). To demonstrate that a proposal falls outside the duty to bargain based on conflict with an agency regulation for which there is a compelling need, an agency must: (1) identify a specific agency regulation; (2) show that there is a conflict between the regulation and the proposal; and (3) demonstrate that the regulation is supported by a compelling need within the meaning of 5 C.F.R. § 2424.50. Association of Civilian Technicians, Montana Air Chapter No. 29 and Dep't. of Defense, 56 FLRA No. 111 (2000). *See also* American Federation of Government Employees, Locals 3807 and 3824 and U.S. Dep't. of Energy, Western Area Power Administration, 55 FLRA 1,3 (1998).

The compelling need criteria are located at 5 C.F.R. § 2424.50:

A compelling need exists for an agency rule or regulation concerning any condition of employment when the agency demonstrates that the rule or regulation meets one or more of the following illustrative criteria;

(a) The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of the agency or primary national subdivision in a manner which is consistent with the requirements of an effective and efficient government.

(b) The rule or regulation is necessary to insure the maintenance of basic merit principles.

(c) The rule or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature.

In NFFE and Alabama Air National Guard, 16 FLRA 1094 (1984), the agency argued that its regulation, requiring an appeal of a RIF action be filed 30 days before the effective date of the action, was essential to its operation. Because the union proposal would prolong the time for appeal until after the effective date of the RIF, it could require corrective action after the RIF, and potentially require the agency to undo the RIF. The FLRA opined that while adhering to the agency time limits would be helpful to the agency's mission and the execution of its functions, the regulation was not essential to these agency objectives. In so deciding the FLRA noted that the agency regulation provided that the appeal time limit could be extended, and also recognized that corrective action might be necessary even after a RIF was effectuated, which was exactly the sort of disruption the agency was then arguing that the regulation was essential to prevent.

In Lexington-Bluegrass Army Depot, 24 FLRA 50 (1986), the Authority examined an appeal of an arbitration award which conflicted with agency regulations for which a compelling need had been found. The matter grieved involved an installation holiday closure to conserve energy, which forced employees to take annual leave or be placed on leave without pay. The FLRA found that there was no compelling need for the base closure regulations; that is, a showing of monetary saving alone is insufficient to establish that a regulation is essential, as opposed to merely desirable. In summary Lexington-Bluegrass held that although the decision to close all or part of an installation is nonnegotiable, the determination as to employee leave status during the closure period is mandatorily negotiable.

In Fort Leonard Wood, 26 FLRA 593 (1987), the Authority ordered the command to negotiate on four union proposals made in response to implementation of a smoking policy. Despite the Army's assertion to the contrary, the Authority found the union proposals involved conditions of employment and had only a limited effect on non-bargaining unit members. Most importantly, the Authority decided that the Army had not established a "compelling need" for its regulations governing smoking in workplaces. While smoking restrictions might generally relate to mission accomplishment, the Army had failed to demonstrate that the restrictions were essential to this purpose. Therefore, union proposals to allow smoking in corridors, lobbies, restrooms, and military vehicles, as well as eating facilities and child care centers with certain restrictions, were negotiable.

In AFGE and General Services Administration, 47 FLRA 576, 580 (1993), the Authority restated its position that "collective bargaining agreements, rather than agency regulations, govern the disposition of matters to which they both apply."(citation omitted).

c. Negotiating Matters Which Are Contrary to Statute - Management Rights - Prohibited Subjects (proposals which are not negotiable). Section 7106(a).

Most of the proposals which are contrary to a statute are contrary to the management rights provisions of 5 U.S.C. § 7106. They are those subjects that Congress has decreed will not be negotiated because they go to the heart of managing effectively and efficiently.

(1) Mission, Budget, Organization, Number of Employees, and Agency Internal Security Practices**.** Section 7106(a)(1).

(a) Mission. "[T]he mission of the agency," the Authority said in Air Force Logistics Command (AFLC), 2 FLRA 604 (1980), is "those particular objectives which the agency was established to accomplish." The mission of the Air Force Logistics Command, for example, is the providing "of logistical support to the Air Force." Not all of any agency's programs are part of its mission. An EEO program was held not to be directly or integrally related to the mission of the Air Force Logistics Command. *See also* West Point Teacher's Assoc. v. FLRA, 855 2d. 236 (2d. Cir. 1988); where court held negotiations over school calendar interferes with management's right to determine its mission.

In NLRB Union Local 21 and NLRB, 36 FLRA 853 (1990) the Authority held a union proposal that the Agency change the hours it was open to the public to be nonnegotiable. The Authority found this proposal to be a direct interference with management's right to determine its mission, *i.e.* when it would be open to the public.

(b) Budget. The meaning of budget is not defined in the FSLMRS. In the AFLC case, the agency contended that a proposal requiring the activity to provide space and facilities for union-operated day care centers interfered with the agency's right to determine its budget. In rejecting this contention, the Authority said that a proposal does not infringe on an agency's right to determine its budget unless (a) the proposal expressly prescribed either the programs or operations the agency would include in its budget or the amounts to be allocated in the budget for the programs or operations, or (b) the agency "makes a substantial demonstration that an increase in costs is significant and avoidable and not offset by compensating benefits." Department of the Air Force, Elgin AFB, 24 FLRA 377 (1986), where the FLRA discussed in detail the two-prong test set out in AFLC.

AF LOGISTICS COMMAND, WRIGHT-PATTERSON AFB, OHIO

2 FLRA 604 (1980)

(Extract)

[The Union submitted the following proposal:]

ARTICLE 36 DAY CARE FACILITIES

The employer will provide adequate space and facilities for a day care center at each ALC. The union agrees to operate the day care center in a fair and equitable manner. The use of the facilities to be available to all base employees under the terms and conditions of the constitution and by-laws of such facility. The day care center will be self-supporting, exclusive of the services and facilities provided by the employer.

* * *

The agency next alleges that Union Proposal I violates its right to determine its budget under section 7106(a)(1) of the Statute because it would require the agency to bear the cost of the space and facilities provided for the day care center. The underlying assumption of this position appears to be that a proposal is inconsistent with the authority of the agency to determine its budget within the meaning of section 7106(a)(1) if it imposes a cost upon the agency which requires the expenditure of appropriated agency funds. Such a construction of the Statute, however, could preclude negotiation on virtually all otherwise negotiable proposals, since, to one extent or another, most proposals would have the effect of imposing costs upon the agency which would require the expenditure of appropriated agency funds. Nothing in the relevant legislative history indicates that Congress intended the right of management to determine its budget to be so inclusive as to negate in this manner the obligation to bargain.

There is no question but that Congress intended that any proposal which would directly infringe on the exercise of management rights under section 7106 of the Statute would be barred from negotiation. Whether a proposal directly affects the agency's determination of its budget depends upon the definition of "budget" as used in the Statute. The Statute and legislative history do not contain such a definition. In the absence of a clearly stated legislative intent, it is appropriate to give the term its common or dictionary definition.[3] As defined by the dictionary, "budget" means a statement of the financial position of a body for a definite period of time based on detailed estimates of planned or expected expenditures during the periods and proposals for financing them. In this sense, the agency's authority to determine its budget extends to the determination of the programs and the determination of the amounts required to fund them. Under the Statute, therefore, an agency cannot be required to negotiate those particular budgetary determinations. That is, a union proposal attempting to prescribe the particular programs or operations the agency would include in its budget or to prescribe the amount to be allocated in

the budget for them would infringe upon the agency's right to determine its budget under section 7106(a)(1) of the Statute.

Moreover, where a proposal which does not by its terms prescribe the particular programs or amounts to be included in an agency's budget, nevertheless is alleged to violate the agency's right to determine its budget because of increased cost, consideration must be given to all the factors involved. That is, rather than basing a determination as to the negotiability of the proposal on increased cost alone, that one factor must be weighed against such factors as the potential for improved employee performance, increased productivity, reduced turnover, fewer grievances, and the like. Only where an agency makes a substantial demonstration that an increase in cost is significant and unavoidable and is not offset by compensating benefits can an otherwise negotiable proposal be found to violate the agency's right to determine its budget under section 7106(a) of the Statute.

Union Proposal I does not on its face prescribe that the agency's budget will include a specific provision for space and facilities for a day care center or a specific monetary amount to fund them. Furthermore, the agency has not demonstrated that Union Proposal I will in fact result in increased costs. On the contrary, the record is that the matter of the cost to the union for space and facilities is subject to further negotiation. It is not necessary, therefore, to reach the issue of whether the alleged costs are outweighed by compensating benefits. Consequently, Union Proposal I does not violate the right of the agency to determine its budget under section 7106(a) of the Statute.

Finally, it is noted that the agency has not adverted to problems which might arise in connection with implementation and administration of an agreement, should it include Union Proposal I, *vis a vis* provisions of applicable law and Government-wide rule or regulation governing, e.g., the use or allocation of space. There, the Authority makes no ruling as to whether Union Proposal I is consistent with such law or regulation.

* * *

In Fort Stewart Schools v. FLRA, 495 U.S. 461 (1990), the Supreme Court ruled that Fort Stewart had to bargain with the union over pay and certain fringe benefits where these items are not set by law and are within the discretion of the agency. The Court rejected the agency's argument that the proposals were not negotiable because they violated management's right to establish its budget. The Court found that the agency failed to prove that the proposals would result in "significant and unavoidable increases" in the budget.

(c) Organization. In the following case, it was held that a union proposal to implement management's reorganization plan through attrition rather than as management desires would unduly delay management and violate management's right to determine its organization.

NAGE and U.S. Dep't of Veterans Affairs, Johnson Medical Center, 55 FLRA No. 120 (1999)

(Extract)

*** * ***

The [case] before the Authority on petition for review of negotiability issues filed by the Union under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) . . . . The proposal . . . proposes to phase in an Agency reorganization through attrition.

*** * ***

Proposals that preclude an agency from exercising a management right unless or until other events occur are generally not within the duty to bargain. . . . Management's right to determine its organization under section 7106(a)(1) of the Statute encompasses the right to determine the administrative and functional structure of the agency, including the relationship of personnel through lines of authority and the distribution of responsibilities for delegated and assigned duties. In other words, this right includes the authority to determine how an agency will structure itself to accomplish its mission and functions. *See e.g., American Federation of Government Employees, Local 3807 and U.S. Department of Energy, Western Area Power Administration, Golden, Colorado*, 54 FLRA 642, 647 (1998) (*WAPA*).

The proposal delays the Agency from fully implementing its reorganization until, through attrition, existing clerks no longer encumber any ward and lead medical clerk positions. As such, the proposal affects the Agency's right to determine its organization. *See id.* (proposal that would require management to alter a reorganization plan affects management's right to determine its organization).

*** * ***

As noted above with respect to the proposal …under existing case precedent, proposals that preclude an agency from exercising a management right unless or until other events occur are generally not within the duty to bargain . . . . [Thus,] we conclude that the proposed arrangement

is not appropriate under the second inquiry in that analysis because it excessively interferes with management's right to determine its organization.

For additional discussion, *see* Congressional Research Employees Association And The Library Of Congress, 3 FLRA 737 (1980) (holding that a union proposal which would require an agency to create four, instead of two, sections in its American Law Division and mandate that each section be assigned a Section Coordinator, violates management's right to determine its organization).

In NTEU and IRS, 35 FLRA 398, 409-410 (1990), the Authority discussed the meaning of the term "determine its organization".

> The right of an agency under section 7106(a)(1) to determine its organization refers to the administrative and functional structure of an agency, including the relationships of personnel through lines of authority and the distribution of responsibilities for delegated and assigned duties. (citations omitted). This right encompasses the determination of how an agency will structure itself to accomplish its mission and functions. This determination includes such matter as the geographic locations in which an agency will provide services or otherwise conduct its operations, and how various responsibilities will be distributed among the agency's organizational subdivisions, how an agency's organizational grade level structure will be designed, and how the agency will be divided into organizational entities such as sections.(footnotes omitted).

In DOD, NGB, Washington Army National Guard, Tacoma, and NAGE, 45 FLRA 782, 786 (1992), the Authority relied on the definition from NTEU and IRS to dismiss a union challenge to a decision by the National Guard to fill certain positions with military personnel rather than with civilians. The Authority determined that filling the position with military personnel went to the right to determine how an agency's grade level organizational structure will be designed. A similar result was reached in DOD, NGB, Michigan Air National Guard, 48 FLRA 755 (1993).

(d) Number of Employees. In E.O. 11491, section 11(b) covered "the number of employees" and "the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty." Because both concepts (*i.e,* "the number of employees" and "the numbers . . . of employees assigned to an organizational unit, work project, or tour of duty") were embodied in section 11(b), cases did not distinguish between them. The August 1969, Study Committee Report which led to the issuance of E.O. 11491 did indicate the differences it had in mind. According to the Study Committee, there would be no obligation to bargain on:

> an agency's right to establish staffing patterns for its organization and the accomplishment of its work - the number of employees in the agency and the number, types, and grades of positions or employees assigned in the various segments of its organization and to work projects and tours of duty. (Emphasis supplied)

Thus, "the number of employees" in § 7106(a) which is now a prohibited subject of bargaining, refers to the total number of employees in an agency, including its personnel ceiling, and/or managerial determinations of how many positions are to be filled within the ceiling. The activity or field installation is prohibited from negotiating on these matters within the activity or field installation. The prohibition applies to the total number of employees within a distinct organizational entity.

The "numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty," found in section 7106(b)(1) refers to the number of employees in an organizational subdivision. It is a permissive subject and will be discussed later.

A proposal which provided for a seven-day work period for unit employees for the purpose of computing overtime under section 7(k) of the Fair Labor Standards Act, did not violate management's right to determine the number of employees assigned, since nothing in the proposal required a change in either the number of unit employees assigned or a change in the already established work schedule. International Association of Fire Fighters, Local F-61 and Philadelphia Naval Shipyard, 3 FLRA 437 (1980).

(e) Internal Security Practices. In AFGE and Dep't of Veterans Affairs Medical Center Boston, Mass., 48 FLRA 41 (1993) the Authority discussed internal security practices.

> An agency's right to determine its internal security practices under section 7106(a)(1) of the Statute includes the right to determine the policies and practices which are part of its plan to secure or safeguard its personnel, physical property, and operations against internal and external risks. (citations omitted). Where an agency shows a link or reasonable connection between its goal of safeguarding personnel or property and protecting its operations, and its practice or decision designed to implement that goal, a proposal which directly interferes with or negates the agency's practice or decision conflicts with the agency's right to determine internal security practices. (citations omitted).
>
> To establish the necessary link, an agency must show a reasonable connection between its goal of safeguarding personnel or property and its practice designed to implement that goal. (citation omitted). Once a link has been established, the Authority will not review the merits of the agency's plan in the course of resolving a negotiability dispute. (citations omitted).

Id., at 44. (The Authority found a single union proposal relating to the use of rotating shifts for police officers to be nonnegotiable.)

Polygraph tests and similar investigative techniques may not be prohibited in collective bargaining agreement language because, said the FLRA, such practices relate to agencies' internal security and therefore are outside the duty to bargain. AFGE Local 1858 and Army Missile Command, Redstone Arsenal Alabama, 10 FLRA 440 (1982).

An agency's decision to implement a drug-testing program is an exercise of the agency's right under 5 U.S.C.A. § 7106(a)(1) to establish internal security practices. AFGE and Department of Education, 38 FLRA 1068 (1990).

A proposal preventing the agency from towing any illegally parked car until efforts are made to locate the driver was found nonnegotiable in Ft. Ben, Harrison, 32 FLRA 990 (1988).

In NFFE and Army, 21 FLRA 233, the Authority found that a proposal concerning the financial liability of an employee for loss, damage, or destruction of property does not interfere with management's right to determine its internal security.

National Federation Of Federal Employees, Local 29 and DA, Kansas City District, Corps Of Engineers,

21 FLRA 233 (1986)

(Extract)

I. Statement of the Case

This case is before the Authority because of a negotiability appeal under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of three Union proposals.

II. Union Proposal 1

The Employer recognizes that all employees have a statutorily created right to their pay, retirement fund and annuities derived therefrom. The Employer further recognizes that charges/allegations of pecuniary liability shall not be construed to be indebtedness or arrears to the United States until the affected employee has had the opportunity to fully exercise his/her rights of due process; wherein due process shall provide equal protection to all employees and shall require a hearing before an unbiased, unprejudiced and impartial tribunal, free from any command pressure or influence. All claims by the Government for pecuniary liability

shall be capped at a maximum of $150.00. (Only the underlined portion is in dispute.)

A. Positions of the Parties

Union Proposal 1 would limit an employee's liability for the loss, damage to or destruction of government property to $150.00, whereas, under the Agency's existing regulations, an employee's liability is now limited to an employee's basic monthly pay. The Agency has refused to negotiate over the proposal contending that the proposal is inconsistent with the Federal Claims Collection Act of 1966 ("Claims Act"), Pub. L. No. 89-508, 80 Stat. 309 (1966) and violates its management right to determine its internal security practices pursuant to section 7106(a)(1) of the Statute.

The Union disputes the Agency's contentions.

B. Analysis

1. Management Rights

In agreement with the Agency, the Authority finds that the proposal violates the Agency's right to establish its internal security practices pursuant to section 7106(a)(1) of the Statute. An agency's right to determine its internal security practices includes those policies and actions which are part of the agency's plan to secure or safeguard its physical property against internal or external risks, to prevent improper or unauthorized disclosure of information, or to prevent the disruption of the agency's activities. *See* American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management, Washington, D.C., 14 FLRA 6 (1984) (Union Proposal 2), *appeal docketed sub nom*. Federal Labor Relations Authority v. Office of Personnel Management, No. 84-1325 (D.C. Cir. July 18, 1984). The Agency's plan as set forth in its regulation provides that an employee's pecuniary liability will be one month's pay or the amount of the loss to the Government, whichever is less. The Agency contends that this regulation acts as a deterrent and encourages employees to exercise due care when dealing with government property. Hence, it constitutes a management plan which is intended to eliminate or minimize risks to government property by making clear the consequences of property destruction, loss or damage, and is within the Agency's right to determine its internal security practices.

Even if, as the Union argues, the Agency's plan is designed primarily as a means of recouping government loss, in the Authority's view the Agency's statutory authority includes determining that the plan has, also, the effect of minimizing the risk of the loss occurring in the first place. Similarly, the Union's argument that the Agency's plan is not an effective

deterrent is beside the point. It is not appropriate for the Authority to adjudge the relative merits of the Agency's determination to adopt one from among various possible internal security practices, where the Statute vests the Agency with authority to make that choice. In this regard, the Union's contention that its proposal limiting liability to $150.00 is merely a procedural proposal under section 7106(b)(2) of the Statute is not persuasive. The proposal directly impinges on management's right to establish its internal security practices.

2. Inconsistent with Federal Law

The Claims Act specifically states that the Act does not diminish the existing authority of a head of an agency to litigate, settle, compromise or close claims. Pursuant to 10 U.S.C. § 4831, *et seq*., the Secretary of the Army was vested with the existing authority to compromise, settle or close claims when the Claims Act was enacted.

There is no provision in 10 U.S.C. § 4831 which limits the Secretary's right to settle, compromise or close claims in fulfilling his responsibilities under the Act. We find that insofar as the Secretary has unrestricted authority to close, settle and compromise on claims for destroyed or damaged property, the Union's proposal is not inconsistent with the Claims Act.

C. Conclusion

Based on the arguments of the parties, the Authority finds that Union Proposal 1 violates section 7106(a)(1) of the Statute and, thus, is outside the duty to bargain. We also find that the proposal is not inconsistent with the Federal Claims Collection Act.

[Discussion of Union Proposal II omitted. The Authority found that the provision, which would force the agency to choose between holding the employee liable or disciplining the employee, directly interfered with management's right to discipline employees under section 7106(a)(2)(A) and was outside the Agency's duty to bargain.]

The Army's civilian drug testing program, embodied in AR 600-85, directly affects its internal security.2 After considering a number of negotiability issues and appeals concerning drug testing, the Authority issued its lead opinion on the matter in 1988.

2 The Army changed the Civilian Drug Abuse Testing Program in 1999. See change 3 to Dep't of the Army Reg. 600-85, Alcohol and Drug Abuse Prevention and Control Program para. 5-14 (1999) (AR 600-85). *See also* Dep't of the Army Memo 600-3, Civilian Personnel, Headquarters Department of the Army Civilian Drug Testing (2000). These changes do not affect the negotiability of the drug testing program; it

NFFE, Local 15, And U.S. Army Armament, Munitions and Chemical Command Rock Island, Illinois

30 FLRA 1046 (1988)

(Extract)

I. Statement of the Case.

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute). It presents issues relating to the negotiability of proposals concerning the Agency's testing of certain selected categories of civilian employees for drug abuse. For the reasons set forth below, we find that three proposals are within the duty to bargain and nine proposals are outside the duty to bargain.

Specifically, we find that Proposal 1, which provides for drug testing of employees only on the basis of probable cause or reasonable suspicion, is outside the duty to bargain under section 7105(a)(1) of the Statute because it directly interferes with management's right to determine its internal security practices and is not a negotiable appropriate arrangement under section 7106(b)(3). Proposal 2, providing that tests and equipment used for drug testing be the most reliable available, we find to be nonnegotiable under section 7106(a)(1) of the Statute because it directly interferes with management's right to determine its internal security practices and is not an appropriate arrangement under section 7106(b)(3). . . .

II. Background

A. The Army Drug Testing Program.

On April 8, 1985, the Department of Defense issued DOD Directive 1010.9, "DOD Civilian Employees Drug Abuse Testing Program." On February 10, 1986, the Department of the Army promulgated regulations implementing the DOD Directive. Interim Change No. 3 to Army Regulation 600-85, Alcohol and Drug Abuse Prevention and Control Program ("Interim Change to AR 600-85" or "amended regulation"). The proposals in dispute in this case arose in connection with impact and implementation bargaining over paragraph 5-14 of the Interim Change to AR 600-85.

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is still an internal security matter subject only to impact and implementation bargaining. AR 600-85, para. 5-10.

Paragraph 5-14 states that the Army has established a drug abuse testing program for civilian employees in critical jobs.

* * *

[C]ivilian employees in jobs designated as critical, as well as prospective employees being considered for critical jobs, will be screened under the civilian drug testing program. Id. at paragraph 5-14c(1). Current employees in these critical positions are subject to urinalysis testing in three situations: (1) on a periodic, random basis; (2) when there is probable cause to believe that an employee is under the influence of a controlled substance while on duty; and (3) as part of an accident or safety investigation. Id. at paragraph 5-14e. Prospective employees for selection to critical positions will be tested "prior to accession." Id. These requirements are considered to be a condition of employment. Id. . . .

The National Federation of Federal Employees, Local 15 (the Union) represents a bargaining unit of civilian employees at the U.S. Army Armament, Munitions and Chemical Command, Rock Island, Illinois (the Agency). The Union submitted collective bargaining proposals regarding the implementation of the amended regulation as to unit employees. The Agency alleged that 12 of the proposals are outside the duty to bargain under the Statute. On May 2, 1986, the Union filed with the Authority a petition for review of the Agency's allegation of nonnegotiability.

B. Events Subsequent to the Filing of the Instant Petition for Review

1. Executive Branch and Congressional Actions

* * *

On September 15, 1986, President Reagan issued Executive Order 12564, entitled "Drug-Free Federal Workplace." See 51 Fed. Reg. 32889 (Sept. 17, 1986). Section 3 of the Executive Order directs the head of each Executive agency to establish mandatory and voluntary drug testing programs for agency employees and applicants in sensitive positions. Section 4(d) authorizes the Secretary of Health and Human Services (HHS) to promulgate scientific and technical guidelines for drug testing programs, and requires agencies to conduct their drug testing programs in accordance with these guidelines once promulgated. Section 6(a)(1) states that the Director of the Office of Personnel Management (OPM) shall issue "government-wide guidance to agencies on the implementation of the terms of [the] Order[.]" Section 6(b) provides that "[t]he Attorney General shall render legal advice regarding the implementation of this Order and shall be consulted with regard to all guidelines, regulations, and policies proposed to be adopted pursuant to this Order."

On November 28, 1986, OPM issued Federal Personnel Manual (FPM) Letter 792-16, "Establishing a Drug-Free Federal Workplace." Section 2(c) of the letter states: "Agencies shall ensure that drug testing programs in existence as of September 15, 1986, are brought into conformance with E.O. 12564." Sections 3, 4, and 5 of the FPM Letter are entitled, respectively, "Agency Drug Testing Programs," "Drug Testing Procedures," and "Agency Action Upon Finding that an Employee Uses Illegal Drugs."

* * *

On February 13, 1987, HHS issued "Scientific and Technical Guidelines for Drug Testing Programs" (Guidelines) as directed in the Executive Order. Thereafter, the Supplemental Appropriations Act of 1987, Pub. L. No. 100-71, 101 Stat. 391, 468 (July 11, 1987) was enacted. Section 503 of that Act required notice of the Guidelines to be publicized in the Federal Register. Notice of the Guidelines was published on August 14, 1987, and interested persons were invited to submit comments. *See* 52 Fed. Reg. 30638 (Aug. 14, 1987). As of the date of this decision, final regulations have not been published in the Federal Register.

* * *

III. Proposal 1.

Section II - Frequency of Testing

The parties agree that employees in sensitive positions defined by AR 600-85 may be directed to submit to urinalysis testing to detect presence of drugs only when there is probable cause to suspect the employees have engaged in illegal drug abuse.

A. Positions of the Parties

The Agency contends that this proposal conflicts with its right to determine its internal security practices under section 7106(a)(1) of the Statute. According to the Agency, it has determined that as part of its program to test employees in certain critical positions, these tests must be conducted periodically without prior announcement to employees. The Agency contends that the proposal would expressly limit the Agency's right to randomly test employees and would impermissible place a condition of "probable cause" on the Agency before the right could be exercised.

* * *

The Union contends that the proposal involves conditions of employment and that the Agency has failed to provide any evidence linking testing for off-duty drug use to internal security. The Union also argues that the Agency has not adequately shown that it has a compelling need for the amended regulation. Finally, the Union asserts that even if

the proposal infringes on an internal security practice, it is negotiable as an appropriate arrangement. The Union contends that this proposal is intended to address the harms that employees will suffer, such as invasion of privacy and the introduction of an element of fear into the workplace, by eliminating the random nature of the testing and substituting a test based on probable cause.

In its supplemental submission, the Union contends that proposals stating that there should be testing of civilian employees for drug use only when there is probable cause do not conflict with Executive Order 12564. The Union also argues that its proposals are consistent with section 3(a) of the Executive Order, which provides that the extent to which employees are tested should be determined based on "the efficient use of agency resources," among other considerations. Union's Supplemental Submission of September 18, 1987, at 2.

B. Discussion

* * *

2. Whether Proposal 1 Directly Interferes with Management's Right to Determine its Internal Security Practices under section 7106(a)(1)

In our view, the proposal directly interferes with management's right to determine its internal security practices under section 7106(a)(1) of the Statute. By restricting the circumstances in which employees will be subject to the drug testing program, the proposal has the same effect as Proposal 2 in National Association of Government Employees, SEIU, AFL-CIO and Department of the Air Force, Scott Air Force Base, Illinois, 16 FLRA No. 57 (1984). The proposal in that case prohibited management from inspecting articles in the possession of employees unless there were reasonable grounds to suspect that the employee had stolen something and was intending to leave the premises with it. The Authority concluded that by restricting management's ability to conduct unannounced searches of employees and articles in their possession, the proposal directly interfered with management's plan to safeguard its property.

Similarly, by limiting management's ability to conduct random testing for employee use of illegal drugs, Proposal 1 directly interferes with management's internal security practices. As the Agency indicated in issuing the Interim Change to AR 600-85, one purpose for instituting the drug testing program is to identify "individuals whose drug abuse could cause disruption in operations, destruction of property, threats to safety for themselves and others, or the potential for unwarranted disclosure of classified information through drug-related blackmail." Interim Change to AR 600-85, Paragraph 5-14a(3). Clearly, the drug testing program set forth in the Agency regulation, including the provision for unannounced

random tests, Interim Change to AR 600-85, Paragraph 5-14e(1)(b), concerns the policies and actions which are a part of the Agency's plan to secure or safeguard its physical property against internal and external risks, to prevent improper or unauthorized disclosure of information, or to prevent the disruption of the Agency's activities.

The Agency has decided, in the Interim Change to AR 600-85, Paragraph 5-14e(1)(b), to use random testing as a part of its plan to achieve those purposes because such testing by its very nature contributes to that objective. Unannounced random testing has a deterrent effect on drug users and makes it difficult for drug users to take action to cover up their use or otherwise evade the tests. *See, for example*, Agency's Supplemental Statement of Position of June 30, 1986 at 2. As such, the use of random testing constitutes an exercise of management's right to determine its internal security practices. *See also* National Federation of Federal Employees, Local 29 and Department of the Army, Kansas City District, U.S. Army Corps of Engineers, Kansas City, Missouri, 21 FLRA 233, 234 (1986), *vacated and remanded as to other matters sub nom.* NFFE, Local 29 v. FLRA, No. 86-1308 (D.C. Cir. Order Mar. 6, 1987), Decision on Remand, 27 FLRA No. 56 (1987).

We will not review the Agency's determination that the establishment of a drug testing program involving random tests for the positions which it has identified as sensitive positions is necessary to protect the security of its installations. As indicated above, the purpose of the Interim Change to AR 600-85 is to prevent the increased risk to security that the Agency has identified as resulting from drug use by employees in those sensitive positions. That is a judgment which is committed to management under section 7106(a)(1) of the Statute. Where a link has been established between an agency's action--in this case random drug testing--and its expressed security concerns, we will not review the merits of that action. We find that such a linkage is present in this case. *See also* the Preamble to Executive Order 12564 and section 1 of FPM Letter 792-16.

This case is not like Department of Defense v. FLRA, 685 F.2d 641 (D.C. Cir. 1982). In that case, the court concluded that there was no "connection" between the proposal at issue and the agency's determination of the internal security practices. Rather, this case is similar to Defense Logistics Council v. FLRA, 810 F.2d 234 (D.C. Cir. 1987). In that case, the Authority found that proposals pertaining to the agency's program to prevent drunk driving were nonnegotiable because they directly interfered with management's right to determine its internal security practices under section 7106(a)(1). In upholding that decision, the U.S. Court of Appeals for the District of Columbia Circuit rejected the claim that the drunk driving program did not involve internal security practices. The court concluded that the Authority's interpretation of the

term "internal security practices" to include preventive measures designed to guard against harm to property and personnel caused by drunk drivers was a reasonable disposition of that issue. In reaching that conclusion, the court specifically distinguished the Department of Defense decision. We see no material difference between the Agency's drug testing program and the drunk driving program.

* * *

IV. Proposal 2

Section III.A - Testing Methods and Procedures

A. The parties agree that methods and equipment used to test employee urine samples for drugs be the most reliable that can be obtained.

A. Positions of the Parties

The Agency asserts that the proposal concerns the methods, means, or technology of performing its work, within the definition of section 7106(b)(1) of the Statute, of assuring, through random drug testing, the fitness of certain employees in critical positions. The Agency contends that by restricting and qualifying the methods and equipment used by the Agency in performing its work, the proposal interferes with the Agency's right under section 7106(b)(1). The Agency also contends that the proposal is not negotiable because it concerns techniques used by the Agency in conducting an investigation relating to internal security and therefore falls within management's right to determine internal security practices under section 7106(a)(1). Finally, the Agency contends that the proposal is not a negotiable appropriate arrangement.

The Union contends that the proposal concerns the methods and equipment used to test employee urine samples, and does not concern the technology, methods, and means of performing work within section 7106(b)(1) because drug testing is not the work of the Agency. The Union also argues that the proposal does not concern the Agency's internal security practices since urinalysis testing bears no relationship to employee performance or conduct at the workplace. Finally, the Union argues that the proposal is an appropriate arrangement because the proposal assures that the most accurate testing methods and equipment will be used.

B. Discussion

1. Whether Proposal 2 Directly Interferes with Management's Right to Determine its Internal Security Practices under section 7106(a)(1)

An integral part of management's decision to adopt a particular plan for protecting its internal security as its determination of the manner in which it will implement and enforce that plan. For example, where management establishes limitations on access to various parts of its operations, it may use particular methods and equipment to determine who may and who may not be given access, such as coded cards and card reading equipment. Polygraph tests may be used as part of management's plan to investigate and deter threats to its property and operations. *See* American Federation of Government Employees, Local 32 and Office of Personnel Management, 16 FLRA 40 (1984); American Federation of Government Employees, AFL-CIO, Local 1858 and Department of the Army, U.S. Army Missile Command, Redstone Arsenal, Alabama, 10 FLRA 440, 444-45 (1982). Similarly, an integral aspect of establishing its drug testing program is management's decision as to the methods and equipment it will use to determine whether employees have used illegal drugs. Put differently, it is not possible to have a program of testing for illegal drugs use by employees without determining how the proposed tests are to be conducted. Management's determination of the methods and equipment to be used in drug testing is an exercise of its right to determine its internal security practices under section 7106(a)(1) of the Statute.

Proposal 2 requires management to use the most reliable testing methods and equipment in the implementation of its drug testing program. The proposal establishes a criterion governing management's selection of the methods and the equipment to be used in any and all aspects of the testing program. It is broadly worded and does not distinguish between the particular parts or stages of the program or the purposes for which the tests and equipment would be used. The effect of the proposal is to confine management's selection of methods and equipment for use at any stage of the testing procedure only to those that are the most reliable. In short, management would be precluded from selecting equipment or methods that are reliable for a particular purpose if there are equipment and methods that were more reliable for that purpose.

By limiting the range of management's choices as to the methods and equipment it may use to conduct drug tests--regardless of the particular phase of the testing process or the purpose of the test--Proposal 2 establishes a substantive criterion governing the exercise of management's determination of its internal security practices. Generally speaking, the most accurate and reliable test at this time for confirming the presence of cocaine, marijuana, opiates, amphetamines, and phencyclidine (PCP) is the gas chromatography/mass spectrometry

(GC/MS) test. *See* the proposed Guidelines, 52 Fed. Reg. 30640. As indicated above, the plain wording of Proposal 2 would therefore appear to require the use of that test at all stages of the drug testing program. *See* Union Response to Agency Statement of Position at 9. It would preclude the use, for example, of the less reliable immunoassay test at any stage or for any purpose, including as an initial screening test. We find, therefore, that the proposal directly interferes with management's rights under section 7106(a)(1) of the Statute and is outside the duty to bargain unless, as claimed by the Union, it is an appropriate arrangement under section 7106(b)(3).

* * *

A narrow majority of Supreme Court Justices approved the drug testing of custom service employees seeking jobs in drug interdiction or which require the use of firearms. The Justices held that the test did not violate the 4th amendment prohibition against unreasonable government search and seizure, despite an absence of "individual suspicion." NTEU vs. Von Raab, 489 U.S. 656 (1989). Also, in a companion case, the court held that drug and alcohol testing of railway train crew members involved in accidents is legal. This case holds that general rules requiring testing "supply an effective means of deterring employees engaged in safely-sensitive task from using controlled substance or alcohol in the first place," Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989). The Army's drug testing program was sustained in Thomson v. Marsh, 884 F.2d 113 (4th Cir. 1989). The court relied upon the Supreme Court's decisions in Skinner and Von Raab. In Aberdeen Proving Ground v. FLRA, 890 F.2d 467 (D.C. Cir. 1989) the D.C. Circuit held that proposals concerning split samples are not negotiable.

In International Federation of Professional and Technical Engineers and Norfolk Naval Shipyard, 49 FLRA 225 (1994), the FLRA held that a union proposal to provide one hour advance notice to employees of upcoming drug tests was nonnegotiable because it interferes with management's right to determine internal security practices.

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(2) In Accordance with Applicable Laws - To Hire, Assign, Direct, Lay Off, and Retain Employees in the Agency, or To Suspend, Remove, Reduce in Grade or Pay, or Take Other Disciplinary Action Against Such Employees (5 U.S.C. § 7106(a)(2)(A)).

(a) To Hire Employees. In Internal Revenue Service, 2 FLRA 280 (1979), the Authority held that the portion of an upward mobility proposal requiring that a certain percentage of positions be filled was violative of section 7106(a)(2)(A). The FLRA said:

> This requirement would violate management's reserved authority under section 7106(a)(2)(A) ... to "hire" and "assign" employees or to decide not to take such actions.

The decision whether to fill vacant positions is encompassed within the agency's right to hire. *See* AFGE Local 3354 and U.S. Dep't of Agriculture Farm Service Agency, Kansas City, 54 FLRA No. 81 (1998). However, in Internal Revenue Service, the Authority ruled that the portion of the proposal requiring management to announce a certain percentage of its vacancies as upward mobility positions was found to be a negotiable procedure. The agency had argued that the proposal would require it to perform a potentially useless act, thereby causing unreasonable delay when the agency decided to fill the positions as other than upward mobility positions or decided not to fill them at all. The Authority, invoking the "acting at all" doctrine it employed in Fort Dix, 2 FLRA 152 (1979), found the "unreasonable delay" argument without dispositive significance.

In Fort Bragg Ass'n of Educators v. FLRA, 870 F.2d 698 (D.C. Cir. 1989), the court looked at the negotiability of a union proposal that teachers in DODDS not be required to sign personal service contracts (PSC) as a condition of employment. The court overturned the FLRA's ruling that the proposal was nonnegotiable because it interfered with management's right to hire under § 7106(a)(2)(A). The court said that the PSC was not an interference with the decision to hire, it was only the procedure that the Army used to record the terms of the appointment. Procedures are subject to bargaining under § 7106(b)(2). The court also cited a Second Circuit decision that held that the use of PSC was unlawful. If the use of PSC is unlawful, then the Army was not hiring in accordance with applicable law as required by § 7106(a)(2). (On remand, the Authority ordered the Army to bargain. NEA and Fort Bragg Schools, 34 FLRA 18 (1989)).

(b) To Assign Employees. The right to "assign employees" applies to moving employees to particular positions and locations. AFGE Local 3354 and U.S. Dep't of Agriculture Farm Service Agency, Kansas City, 54 FLRA No. 81 (1998).

AFGE, Local 987 and
Air Force Logistics Center, Robins AFB, Georgia

35 F.L.R.A. 265 (1990)

(Extract)

I. Statement of the Case

This case is before the Authority based upon a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). It concerns the negotiability

of three proposals which require the Agency to make reassignments based on volunteers or, in the event that there is an insufficient number of volunteers, inverse order of seniority. A section of one of the proposals also permits employees who are involuntarily reassigned to transfer back to their previous positions after 120 days. The Agency filed a Statement of Position in support of its contention that the proposals are nonnegotiable. The Union did not file a Response to the Agency's Statement of Position, although the Authority granted the Union's request for an extension of time to file a response. For the reasons which follow, we find that the proposals are nonnegotiable because they interfere with management's rights to assign employees and assign work under section 7106(a)(2)(A) of the Statute.

II. Background

The Warner Robins Air Force Logistics Center, Directorate of Maintenance, employs 7,000 employees in 6 divisions. This case involves three proposals submitted in response to three "planned reassignments/reorganizations within the Aircraft, Industrial Products, and Electronics Divisions," as described below. Agency Statement of Position at 2.

First, to accommodate "a decrease in workload in the Electronics Division and an increase in workload in the Aircraft Division," management "proposed the reassignment of 47 employees from the Production Branch of the Electronics Division (MAI) to the Production Branch of the Aircraft Division (MAB)." Id. The reassignment involved relocation to a new building, new position descriptions and different work, performance standards and supervisors. Id. According to the Agency, the selections of employees for these positions were based on "qualifications, the need for services in the gaining/losing organizations, and other standard managerial considerations." Id.

Second, to shift "only the responsibility for the work" from the Aircraft Division to the Industrial Products Division, management proposed the reassignment of approximately 80 employees from the Production Branch of the Aircraft Division to the Production Branch of the Industrial Products Division. There was no physical move and there were "no significant changes in the employees' duties and responsibilities, supervisors, etc." Id. at 3. [Emphasis in original.]

Third, "to more efficiently organize the workload to enhance the utilization of some 66 employees," management proposed reorganization of the Scheduling Branch in the Aircraft Division. Id. at 2. "The employees did not physically move nor was there any change in duty, hours, title, grade, or series, etc. The only significant change was in supervisory assignments and the flow of the workload." Id.

III. Proposals

Proposal 1

MAI PERSONNEL FILLING MAB AIRCRAFT ELECTRICIAN POSITIONS

With respect to the MAI employees that are to fill the Aircraft Electrician slots in MAB, it is agreed that the positions will first be offered to volunteers. In the event that there are more volunteers than slots available in MAB, the volunteers with the most seniority (SCD) Service Computation Date, will be permitted the slots. In the event that there are insufficient volunteers to fill the MAB slots, the MAI employees with the least seniority (SCD) will fill the slots.

Proposal 2 . . .

(4) After 120 days a drafted employee will be permitted a lateral transfer back to the MAB Division.

Proposal 3

It is agreed by the parties that the staffing of both Material Support Unit (MSU) and Production Support Unit (PSU) will be done in the following manner:

(1) Solicit Volunteers from all the employees involved.

(2) If more volunteers are obtained than actual available positions, the volunteers will fill the slots in order of seniority.

(3) If not enough volunteers are obtained the positions will be filled by drafting in inverse order of seniority until all required positions are filled.

It is further agreed that staffing of multiple shifts will be staffed IAW Article 1 of the Local Supplement to the MLA and overtime assignments will be filled IAW Article 5 of the Local Supplement to the MLA.

IV. Positions of the Parties

The Union states that the intent of the proposals is to apply the procedures established in the parties' master labor agreement governing the assignment to overtime, details, loans and temporary duty (TDY) to the reassignments and reorganization proposed by the Agency. Union's Petition for Review at 4. The Union claims that it "has no interest in determining the qualifications; whether or not the [Agency] uses competitive procedures; which positions to fill, if any; the numbers, grades

or types; or any other management right provided by 5 U.S.C. § 7106." Id. The Union further argues that the proposals are consistent with law and regulation because they would apply within the context of the parties' master labor agreement and local supplemental agreement, which require compliance with all applicable laws and regulations. Id. The Union further argues that if the proposals are found to interfere with management's rights, they constitute appropriate arrangements, and/or negotiable procedures for employees affected by the exercise of those rights. *Id*.

* * *

The Agency argues that the proposals are nonnegotiable because they conflict with management's rights to assign employees and to assign work. It asserts that the proposals interfere with the Agency's right to determine: (1) which employee will be assigned; (2) the skills and qualifications needed for the position; and (3) whether employees possess the necessary skills and qualifications. The Agency argues that Proposal 2 also interferes with management's right to assign work because it interferes with management's right to determine the duration of the assignment. Agency Statement of Position at 9-10. Lastly, the Agency argues that Proposal 3 concerns the duties the "[A]gency will assign to an employee and under whose supervision the employees will work, matters within the province of the Agency." Agency Statement of Position at 11.

V. Analysis and Conclusions

The right to assign employees under section 7106(a)(2)(A) encompasses the right to make assignments of employees to positions. For example, *see* American Federation of Government Employees, AFL-CIO, Local 738 and Department of the Army, Combined Arms Center and Fort Leavenworth, Fort Leavenworth, Kansas, 33 FLRA 380 (1988) (Combined Arms Center); and Fort Knox Teachers Association and Fort Knox Dependent Schools, 25 FLRA 1119 (1987) (Fort Knox Dependent Schools), *reversed as to other matters sub nom.* Fort Knox Dependent Schools v. FLRA, 875 F.2d 1179 (6th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3353 (U.S. Nov. 7, 1989) (No. 89-736). This right includes: (1) making reassignments as well as "initial" assignments; (2) determining the particular qualifications and skills needed to perform the work of the position, including such job-related individual characteristics as judgment and reliability; and (3) determining whether employees meet those qualifications. *Id*.

In Combined Arms Center, the Authority held that a proposal which required the agency to reassign either a volunteer or the least senior employee from among those in positions affected by a realignment of an engineering technician position from one division to another was nonnegotiable. The Authority found that the proposal directly interfered with management's right to assign employees because it did "not allow the

Agency to make any judgment on the qualifications of those employees, relative to each other or to other employees, to perform the work of the position in [the gaining division]." 33 FLRA at 382. *See also* Naval Air Rework Facility, Jacksonville, Florida and National Association of Government Inspectors and Quality Assurance Personnel, 27 FLRA 318 (1987) (arbitration award could not properly enforce a collective bargaining agreement so as to deny an agency the authority to assign employees to different shifts for cross-training purposes).

In some circumstances, there is a duty to bargain over the procedure for determining which one of two or more employees who perform the same work will be selected for an assignment or reassignment. Such a procedure is negotiable only to the extent that it applies "when management finds that two or more employees are equally qualified for an assignment." [Emphasis in original.] Combined Arms Center, 33 FLRA at 383 *citing* Overseas Education Association, Inc. and Department of Defense Dependents Schools, 29 FLRA 734, 793 (1987) (proposal to use seniority as a tie breaker where two or more employees are equally qualified and capable of performing held negotiable), *aff'd mem. as to other matters sub nom.* Overseas Education Association, Inc. v. FLRA, 872 F.2d 1032 (D.C. Cir. 1988).

For example, where management establishes more than one shift during which the same work is performed and the employees have the required qualifications and skills to perform the duties, a proposal concerning which employees will be assigned to various shifts is negotiable. Laborers' International Union of North America, AFL-CIO-CLC, Local 1267 and Defense Logistics Agency, Defense Depot Tracy, Tracy, California, 14 FLRA 686, 687 (1984) (proposal to offer vacancies on Monday through Friday shift to most senior "otherwise qualified" employees on irregular shifts held negotiable). Similarly, where management determines that it is necessary for some employees to perform the duties of their positions at a different location, and that the employees management determines have the required qualifications and skills, a proposal concerning which of those employees who are assigned to the positions will do the work does not conflict with an agency's right to assign employees. National Treasury Employees Union and Internal Revenue Service, 28 FLRA 40, 43 (1987) (proposal to assign certain home office rather than field-located work to union officials held negotiable); American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 5 FLRA 83 (1981) (proposal to assign temporary duty in a different geographical area based on seniority held negotiable).

In the present case, Proposals 1, 2, and 3 require the Agency to reassign volunteers or, if there are too many or not enough volunteers, to use seniority as the criterion for reassignment. Management has not

determined that the employees involved are equally qualified for the assignments as discussed above. To the contrary, the Agency asserts that the proposals require it to reassign the employees "without regard for the skills and qualifications needed to do the work as well as such job related characteristics as judgment and reliability." Agency Statement of Position at 8-9.

By requiring volunteers or seniority to be determinative of which employees will be reassigned, Proposals 1, 2, and 3 prevent the Agency from exercising its judgment concerning the qualifications of the reassigned employees to perform the work of the new positions. Therefore, we find that Proposals 1, 2, and 3 directly interfere with the Agency's right to assign employees by preventing the Agency from assigning only employees whom it determines possess the qualifications and skills needed for the "planned reassignment/reorganizations within the Aircraft, Industrial Products, and Electronic Divisions." Agency Statement of Position at 2. See, for example, Combined Arms Center; and Fort Knox Dependent Schools.

The wording in Proposal 2, which restricts employees who volunteer to those who possess "the desired grades and skills," does not render the proposal negotiable. By requiring the Agency to reassign volunteers from other sections within the MAB Division who possess "the desired grades and skills," the proposal precludes the Agency from taking into consideration the particular needs of the various sections and divisions within the Agency. Proposals which have the effect of forcing an agency to reassign employees to certain positions irrespective of organizational or mission requirements directly interfere with management's right to assign employees under the Statute and are outside the duty to bargain. *See e.g.,* International Brotherhood of Electrical Workers, Local 2080 and Department of the Army, U.S. Army Engineer District, Nashville, Tennessee, 32 FLRA 347, 357 (1988) (Provisions 3 and 4, which required management to fill vacancies with internal candidates from organizational units or classifications having a surplus of employees, directly interfered with management's right to assign employees); American Federation of Government Employees, Local 85 and Veterans Administration Medical Center, Leavenworth, Kansas, 32 FLRA 210, 217 (1988) (Proposal 11, which required the agency to assign either all or none of several particular employees to certain positions, directly interfered with management's right to assign employees under the Statute).

In addition, Section 4 of Proposal 2 interferes with management's rights to assign employees and assign work because it prevents the Agency from determining the duration of assignments. Deciding when an assignment begins and ends is inherent in the right to assign employees under section 7106(a)(2)(A). *See* American Federation of Government

Employees, AFL-CIO, Local 916 and Tinker Air Force Base, Oklahoma, 7 FLRA 292 (1981) (Provision II, restricting certain details to 60 days, found nonnegotiable). *See also* Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO and Norfolk Naval Shipyard, 31 FLRA 131, 139-40 (1988) (provision restricting agency's ability to assign an employee to a detail for more than 90 days in a calendar year held nonnegotiable). Section 4 of Proposal 2 permits employees to transfer back to their former position after 120 days. This section prevents the Agency from determining the duration of a particular assignment and, thereby, directly interferes with management's rights to assign employees and assign work.

* * *

Accordingly, we find that Proposals 1, 2, and 3 directly interfere with management's rights to assign employees and assign work and that the Union has not provided a basis for determining that any of these proposals are negotiable as appropriate arrangements. Therefore, Proposals 1, 2, and 3 are outside the duty to bargain.

VI. Order

The petition is dismissed.

The right to assign employees encompasses the right to determine the skills and qualifications necessary to perform the job, as well as other job-related characteristics, such as judgment and reliability, and the right to determine whether individual employees meet those qualifications. American Federation of Gov't. Employees, Local 3295 and U.S. Dep't of the Treasury, Office of Thrift Supervision, 47 FLRA 884, 907 (1993), aff'd 46 F3d 73 (D.C. Cir. 1995). Further, the right to assign employees includes the right to decide among qualified employees in filling a position, not just to determine whether the minimum qualifications are met. American Federation of Gov't. Employees, Local 3172 and U.S. Dep't of Health and Human Services, Social Security Administration, Modesto, CA, 48 FLRA 489,496 (1993).

Given the Authority's interpretation of management's right to assign employees, the Authority found a number of proposals requiring that seniority be used in determining which employee is to be assigned to a position violative of Section 7106(a)(2)(A). They included a requirement that seniority be used in detailing employees to lower-graded positions, in detailing employees to positions outside the unit, and reassigning employees to other duty stations.

On the other hand, the Authority held that a proposal which required management to use seniority in detailing employees to higher- or equal-graded positions, when management elects not to use competitive procedures, was negotiable.

Other proposals found to interfere with management's right to assign employees to positions include:

1. Requiring that an employee be granted administrative leave four times to the extent necessary to sit for any bar or CPA examination. NTEU and Dep't of Treasury, 39 FLRA 27 (1991).

2. Requiring appraiser to be at least one grade level above the employee to be appraised and to have consistently monitored the employee's work performance. Professional Airways Systems Specialist and Dep't of Navy, 38 FLRA 149 (1990).

3. Requiring the length of an assignment to phone duty be for no more than one day. AFGE and Dep't of Labor, 37 FLRA 828 (1990).

(c) To Direct Employees.

> The right to direct employees in the agency is not defined in the statute, is not specifically discussed in the legislative history and has not been applied in prior decisions of the Authority. Therefore, consistent with the main purpose and meaning of the Statute and in the absence of any indication the phrase as used in the Statute has a meaning other than its ordinary meaning, the right "to direct . . . employees in the agency" means to supervise and guide them in the performance of their duties on the job. NTEU and Dep't of the Treasury, Bureau of Public Debt, 3 FLRA 769, 775 (1980).

The Authority held that a proposal to establish a particular critical element and performance standard would directly interfere with the exercise of management's rights to direct employees and to assign work under section 7106(a)(2)(A) and (B) of the Statute and, therefore, was not within the duty to bargain. *Id.*

A number of cases have addressed a variety of similar proposals concerning the criteria management uses to determine job critical elements and performance standards. In all these cases, the FLRA has held that these proposals are not negotiable because they would curtail management's unlimited right to assign and direct work. *See* NTEU and Dept. of HHS, 7 FLRA 727 (1983); AFGE Local 1968 and DOT St. Lawrence Seaway, 5 FLRA 70 (1981), *aff'd sub. nom*. AFGE v. FLRA, 691 F.2d 565 (D.C. Cir. 1982). But, union proposals that mandate discussions between managers and employees of performance appraisals before the evaluations go to a reviewing official are negotiable. Such advance discussions do not interfere with management's decision making processes or any other aspect of its reserved right to direct employees and assign work. NFFE and Dept. of the Army, Fort Monmouth, N.J., 13 FLRA 426 (1983).

The Authority recently reiterated these rules in AFGE and HHS, SSA District Office, Worchester, Mass., 49 FLRA 1408, (1994).

(d) To Suspend, remove, reduce in grade or pay, or take other disciplinary action.

National Federation Of Federal Employees, Local 1438 and U.S. Department Of Commerce, Bureau Of The Census, Jeffersonville, Indiana

47 FLRA 812 (1993)

(Extract)

I. Statement of the Case

This case is before the Authority on a negotiability appeal filed by the Union under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). The appeal concerns the negotiability of one provision of a collective bargaining agreement that was disapproved by the Agency head under section 7114(c) of the Statute. The provision concerns the timeliness with which management effectuates disciplinary actions against employees. For the following reasons, we find that the provision is negotiable.

II. Provision

Article 17, Section 17.4, second paragraph

The employee will be given up to 3 workdays to respond to the charge(s). If discipline is not warranted, the record of infraction will be destroyed and the employee or representative, if any, will be notified immediately. If discipline is warranted, branch management will make a timely decision following the employee's response and return a copy of the record of infraction to the employee or representative, if any. In the case of oral admonishments, they will be decided upon at the branch level. All remaining actions listed in 17.1 and 17.2 above will be forwarded to the Personnel Management Staff where an expeditious recommendation for appropriate discipline will be made. [Only the underscored portions are in dispute.]

III. Positions of the Parties

A. Agency

The Agency interprets the provision as requiring that management's initial decision that discipline is warranted be timely and that the recommendation by the Personnel Management Staff for appropriate discipline be expeditious. According to the Agency, under the provision, if an arbitrator concluded that management did not timely decide that discipline was warranted or that a recommendation of appropriate discipline was not expeditious, the arbitrator could revoke the discipline. The Agency claims that such an arbitrator's award would have the effect of establishing a statute of limitations and would directly interfere with management's right under section 7106(a)(2)(A) of the Statute to take disciplinary action against employees.

The Agency asserts that a contractual statute of limitations on the initiation of disciplinary action is nonnegotiable because it precludes management from exercising its right to discipline employees under section 7106(a)(2)(A) of the Statute. The Agency cites, among others, the Authority's decisions in Antilles Consolidated Education Association and Department of Defense, Office of Dependents Schools, Antilles Consolidated School System, Fort Buchanan, Puerto Rico, 45 FLRA 989 (1992) (Antilles) and American Federation of Government Employees, AFL-CIO, Local 3732 and U.S. Department of Transportation, United States Merchant Marine Academy, Kings Point, New York, 39 FLRA 187, 201 (1991) (Merchant Marine Academy). Specifically, the Agency notes that, in Merchant Marine Academy, the Authority rejected "a [u]nion's explanation that a contractual provision was merely intended to assure timely notice to employees and that untimeliness would not require that the action be set aside, unless there was 'harmful error'[.]" Statement at 6. The Agency states that, notwithstanding the union's explanation, the Authority found that the provision imposed a statute of limitations on discipline and, therefore, was nonnegotiable.

The Agency acknowledges that, in National Treasury Employees Union and U.S. Department of Agriculture, Food and Nutrition Service, Western Region, 42 FLRA 964, 988-90 (1991) (Food and Nutrition Service), the Authority found that a provision containing a timeliness limitation on management's right to discipline that was phrased in general terms, rather than specifying a specific number of days, was negotiable. The Agency also notes that the decision in Food and Nutrition Service cited National Federation of Federal Employees, Local 1853 and U.S. Attorney's Office, Eastern District of New York, Brooklyn, N.Y., 29 FLRA 94 (1987) (Eastern District) (Provision 1), in which the Authority found that a provision requiring that disciplinary action be taken within a reasonable period of time did not directly interfere with management's right to discipline. The Agency argues, however, that Eastern District concerned application of the harmful error rule and did not constitute a repudiation of the "principle that a contractual statute of limitations was nonnegotiable[.]" Statement at 9.

The Agency argues that the Authority's rationale in Food and Nutrition Service "flies in the face of reality." *Id.* at 7. According to the Agency, the only reason for an employee in a grievance challenging discipline to assert the "procedural defense of untimeliness" is to demonstrate that he or she should not be disciplined because of the untimeliness. *Id.* at 8. The Agency also argues that Food and Nutrition Service is inconsistent with Antilles and Merchant Marine Academy. The Agency states that the only difference between the Antilles and Merchant Marine Academy cases and the Food and Nutrition Service case is that, in Antilles and Merchant Marine Academy, the proposals themselves specified the limitations on management and, under Food and Nutrition Service, an arbitrator would be allowed to specify the limitations. The Agency maintains that this "is a distinction without significance" and contends that the effect of the provision in dispute "remains as a direct interference with management's right to discipline by creating contractual time limits enforceable via arbitration." *Id.* at 11.

B. Union

The Union argues, citing Immigration and Naturalization Service and American Federation of Government Employees, Local 505, 22 FLRA 643 (1986) (INS) and United States Customs Service and National Treasury Employees Union, 22 FLRA 607 (1986), that "an arbitrator can reverse or mitigate a disciplinary action because of management's dilatoriness." Response at 4. The Union states that in INS the Authority held that an arbitrator could find that an agency's delay in initiating disciplinary action "does not actually promote the efficiency of the service." *Id.* at 5. The Union claims that the Agency "makes no effort to show that it may, in accordance with 5 U.S.C. Chapter 75, proceed dilatorily and effect untimely disciplinary actions." *Id.*

The Union states that "[a]s the [A]gency concedes, the Authority has found that proposals essentially identical to the [provision] in dispute here do not affect the authority of management officials to take disciplinary actions within the meaning of 5 U.S.C. § 7106(a)(2)(A)." *Id.* Citing Food and Nutrition Service and Eastern District, the Union asserts that the Agency "makes no persuasive case for abandoning these precedents." *Id.*

The Union claims that the provision "is obviously a procedure which management officials would observe in exercising their right to discipline" under section 7106(a)(2)(A) of the Statute. *Id.* The Union claims that, "[b]y the plain terms of [section] 7106(b)(2)," proposals that establish procedures governing the exercise of management's rights under section 7106(a) are negotiable. *Id.* at 6. The Union also asserts that "[a]bsent a showing that the [provision] is procedural in form only," the provision

cannot be found to be nonnegotiable under section 7106(a)(2)(A). *Id.* (footnote omitted). The Union contends, in this connection, that the Agency has not "identif[ied] a single hypothetical situation in which compliance with the [provision] would be tantamount to rendering meaningless [the Agency's] authority, in accordance with applicable law, to take disciplinary action." *Id.* The Union states that the provision is intended to "reduce the number of stale, untimely disciplinary actions management successfully takes." *Id.* at 5-6.

IV. Analysis and Conclusions

For the following reasons, we find that the provision is negotiable as a procedure under section 7106(b)(2) of the Statute.

A. The Meaning of the Provision

The provision prescribes the steps that management will take after it notifies an employee that the employee is subject to discipline. Once an employee has had an opportunity to respond to disciplinary charges, the provision requires the Agency to timely decide that discipline is warranted and to expeditiously recommend an appropriate penalty. The provision does not prescribe the consequences that would result from management's failure to timely decide that discipline is warranted or to expeditiously recommend an appropriate penalty. Rather, the proposal simply establishes a standard of timeliness governing the Agency's completion of the steps of the disciplinary process.

B. The Provision Does Not Directly Interfere with Management's Right to Discipline Employees under Section 7106(a)(2)(A) of the Statute.

In Merchant Marine Academy, we found that Provision 4, which required that a written decision be provided to an employee subject to disciplinary charges within 45 days after receipt of the employee's response to the notice of proposed discipline, was negotiable. Specifically, we found that the provision was incorrectly characterized as a "statute of limitations" on disciplinary action. We noted that the Authority had held proposed contractual time limits on disciplinary actions to be nonnegotiable "where failure to meet those limits would result in an agency's inability to take any action at all with respect to a potential disciplinary matter." Merchant Marine Academy, 39 FLRA at 203.

We found that Provision 4 in Merchant Marine Academy did not state that the untimely delivery of the written decision would bar the imposition of disciplinary action. We also found that Provision 4 was distinguishable from Provisions 3 and 8, which were found to be nonnegotiable, because expiration of the time limits in Provisions 3 and 8 barred disciplinary action based on the incident involved, while the time

limit in Provision 4 did not bar disciplinary action. We found that Provision 4 did not directly interfere with management's right to discipline employees under section 7106(a)(2)(A) of the Statute and concluded, therefore, that Provision 4 was a negotiable procedure under section 7106(b)(2) of the Statute.

Nothing in the provision at issue in this case provides that the proposed disciplinary action will be barred if management fails to comply with the timeliness standards prescribed in the provision. The Union states that the provision is intended to reduce the number of "stale, untimely" disciplinary actions. Response at 5. This statement is consistent with the wording of the provision. Based on the Union's statement, we reject the Agency's argument that the only reason for grievants to assert the untimeliness of the Agency's action is to demonstrate that they should not be disciplined. Rather, we find that the provision ensures that, once the employee has responded to a proposed disciplinary action, processing of the discipline will be completed while the relevant evidence is fresh and available.

Consequently, we find that, under the provision in this case, as with Provision 4 in Merchant Marine Academy, failure to meet the prescribed time limit does not prevent the Agency from acting on the underlying disciplinary matter. Accordingly, we find, consistent with Provision 4 in Merchant Marine Academy, that the provision does not directly interfere with management's right to discipline employees under section 7106(a)(2)(A) of the Statute. We conclude, therefore, that the provision is a negotiable procedure under section 7106(b)(2) of the Statute. *See also* Food and Nutrition Service, 42 FLRA at 989; Eastern District, 29 FLRA at 96.

We reject the Agency's contention that our holdings in Food and Nutrition Service and Eastern District are inconsistent with our holdings as to Provisions 3 and 8 in Merchant Marine Academy and the proposal in Antilles. Provisions 3 and 8 in Merchant Marine Academy and the proposal in Antilles established contractual statutes of limitation that prevented management from disciplining employees after the prescribed time limits had expired. The provisions in Food and Nutrition Service and Eastern District established contractual standards for judging the timeliness of an agency's disciplinary actions that did not prevent the agency from taking disciplinary action. As we made clear in our disposition of Provision 4 in Merchant Marine Academy, proposals that would bar an underlying disciplinary action upon the expiration of specified time limits are nonnegotiable; proposals that establish timeliness standards governing completion of the various stages of the disciplinary process, but do not preclude management from imposing discipline, are negotiable as procedures under section 7106(b)(2) of the Statute. Nothing in the Agency's argument has persuaded us to abandon that distinction.

Consequently, we conclude that our decisions in Food and Nutrition Service and Eastern District are consistent with our holdings as to Provisions 3 and 8 in Merchant Marine Academy and in Antilles.

* * *

Accordingly, we conclude that the provision is negotiable as a procedure under section 7106(b)(2) of the Statute.

V. Order

The Agency shall rescind its disapproval of the provision.

In NFFE, Local 29 and Corps of Engineers, Kansas City, 21 FLRA 233 (1986), the Authority found a proposal that provided an employee the right to remain silent during a Report of Survey investigation was not negotiable because it interfered with the right to discipline employees.

See also Tidewater Virginia Federal Employees Metal Trades Council and Navy Public Works Center, Norfolk, Virginia, 15 FLRA 343 (1984). In the Tidewater case, the Authority, in agreement with the 1982 decision of the 9th Circuit Court of Appeals in Navy Public Works Center, Honolulu, Hawaii, found that a proposed contract provision concerning an employee's right to remain silent during any discussion with management in which the employee believed disciplinary action may be taken against him or her was outside the duty to bargain, as the provision prevented management from acting at all with regard to its substantive rights under section 7106(a)(2)(A) and (B) of the Statute to take disciplinary action against employees and to direct employees and assign work by having employees account for their conduct and work performance.

Union proposals to limit the type and age of evidence used to support disciplinary action have been found to violate management's right to discipline employees. *See* AFGE and Naval Air Warfare Center, Patuxent River, Maryland, 47 FLRA 311 (1993) (proposal to limit use of supervisor's personal notes); NAGE and DVA Medical Center, Brockton and West Roxbury, Massachusetts, 41 FLRA 529 (1991) (proposal to limit use of supervisor's notes relating to performance evaluation); AFGE, Local 3732 and DOT, U.S. Merchant Marine Academy, Kings Point, New York, 39 FLRA 187 (1991) (proposal to prevent use of supervisor's notes older than 18 months).

Proposals which require progressive discipline have been held to interfere with management's right to remove or take other disciplinary action as they restrict the agency's right to choose a specific penalty. NTEU and Customs Service, Washington, D.C., 46 FLRA 696, 767-769 (1992); Merchant Marine Academy, 39 FLRA 187.

(e) To layoff or retain.

In NAGE, Local R1-144 and Naval Underwater Systems Center, 29 FLRA 471 (1987) the Authority defined the term layoff while discussing a proposal that would require the agency to place employees on administrative leave rather than furlough during brief periods of curtailed agency operations. "[W]hile the term 'to lay off' is not defined in the statute it generally involves the placing employees in a temporary status without duties for nondisciplinary reasons." (p. 477). The Authority went on to hold that the proposal was negotiable since employees could be laid off in a paid or nonpaid status and therefore, the proposal did not interfere with management's right to lay off employees.

Proposals designed to minimize the impacts of RIFs on bargaining unit employees are frequently challenged as an interference with management's right to layoff. In Federal Union of Scientists and Engineers, NAGE Local R1-144 and Naval Underwater Systems Center, 25 FLRA 964 (1987) a proposal which required termination of all temporary, part-time and other similar categories of employees before taking RIF action against full-time employees was found to be nonnegotiable.

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(3) To Assign Work, To Make Determinations With Respect To Contracting Out, and To Determine the Personnel By Which Agency Operations Shall Be Conducted.

(a) To Assign Work. This refers to the assignment of work tasks or functions to employees. The right to assign duties to positions or employees has also been construed broadly by the Authority. Proposals aimed at placing limitations on the right to assign work have consistently been found nonnegotiable. Although management has broad authority to assign work, it can be required to bargain on proposals that would require the updating of position descriptions so that they accurately reflect the duties assigned.

In Georgia National Guard, 2 FLRA 580 (1979), the Authority held that a proposal prohibiting the assignment of grounds maintenance or other non-job related duties to technicians and preventing management from assigning such work, regardless of whether reflected in position descriptions, without employee consent, violated section 7106(a)(2)(B). FLRA distinguished this proposal from that in dispute in the Fort Dix case (infra) by noting that the proposal in Fort Dix, while it required management to amend position descriptions, did not prevent management from assigning additional duties. The first paragraph of the Georgia National Guard proposal, on the other hand, prevented the agency from assigning certain duties to technicians even if their position descriptions include, or were amended to include, such duties.

AFGE, Local 199 and
Army - Air Force Exchange Service, Fort Dix, New Jersey

2 FLRA 16 (1979)

(Extract)

* * *

Union Proposal II

Article 13, Section 2

The phrase "other related duties as assigned," as used in job descriptions, means duties related to the basic job. This phrase will not be used to regularly assign work to an employee which is not reasonably related to his basic job description. [Only the underlined portion is in dispute.]

Question Here Before the Authority

The question is whether the union's proposal would violate section 7106(a)(2)(B) of the Statute.

Opinion

Conclusion: The subject proposal does not conflict with section 7106(a)(2)(B) of the Statute. Accordingly, pursuant to section 2424.8 of the Authority's Rules and Regulations (44 Fed. Reg. 44740 et seq. (1979)), the agency's allegation that the disputed proposal is not within the duty to bargain, is set aside.

Reason. The union's proposal would prevent the agency from using the term "other related duties as assigned" in an employee's position description to assign the employee, on a regular basis, duties which are not reasonably related to his or her position description. The agency alleges that this proposal would affect its authority to assign work in violation of the Statute. However, it would appear, both from the language of the proposal and the union's intent as stated in the record, that the agency has misunderstood the effect of the proposal. That is, the plain language of the union's proposal concerns agency management's use of employee position descriptions in connection with the assignment of work, not, as the agency argues, the assignment of work itself.

Under Federal personnel regulations, a position description is a written statement of the duties and responsibilities assigned to a position. It is the official record of, among other things, the work that is to be performed by the incumbent of the position, the level of supervision required, and the qualifications needed to perform the work. From the standpoint of the employee, the position description defines the kinds and the range of duties he or she may expect to perform during the time he or

she remains in the position. In the actual job situation, however, an employee might never be assigned the full range of work comprised within the position description. That is, the position description merely describes work which it is expected would be assigned, but is not itself an assignment of work.

In addition, the position description is the basis of the classification and pay systems for Federal employees. The validity of the classification of employee's position, and, derivatively, of an employee's rate of pay, is thus dependent on the accuracy of an employee's position description. Changes in the kinds and the level of responsibility of the duties assigned an employee may necessitate changes in the position description and, correlatively, depending on the circumstances, changes in the classification and the rate of pay of the position.

It is in this context that the intent of the union's proposal must be understood. Both the language of the proposal and the record in this case support the conclusion, briefly stated, that the subject proposal is designed to insure the accuracy of employee position descriptions. That is, the intended effect of the proposal is to prevent the agency from expanding the work regularly required of the incumbent of a position by assigning work which is not reasonably related to the duties spelled out in the position description under the guise of the general phrase "other related duties as assigned." This does not mean, however, that the proposal would foreclose the agency from adding such unrelated duties to a position. Nothing in the language of the proposal or the record indicates that it is intended to shield the employee from being assigned additional "unrelated" duties, *i.e.* duties which are not within those described in his or her existing position description in order to do so. The proposal would in no way preclude the agency from including additional, though related, duties in the position description. Thus, in the circumstances of this case, the right of the agency to assign work remains unaffected, while the employee is assured that his or her position description accurately reflects the work assigned to the position.

As indicated at the outset, therefore, the agency has misunderstood the intended effect of the union's proposal. The subject matter of that proposal is not the assignment of work, as alleged by the agency, but the application of the phrase "other related duties as assigned" when used in a position description. The agency has failed to support its allegation that such a proposal is nonnegotiable under section 7106. Accordingly, the agency's allegation is hereby set aside.

* * *

Although proposals concerning work assignment are nonnegotiable, proposals dealing with overtime are often negotiable. Management must be prepared to negotiate who will be assigned overtime but need not negotiate how much overtime is to be assigned or if it is necessary at all. *See* AFGE and Dep't of Agriculture, 22 FLRA 496 (1986); NFFE and VA, 27 FLRA 239 (1987); Nat'l Assoc. of Agriculture Employees and Dep't of Agriculture Animal and Plant Health Inspection Service, Elizabeth, N.J., 49 FLRA 319 (1994).

The right to assign duties was elaborated upon in the Denver Mint case, 3 FLRA 42 (1980), where the Authority, in addition to finding that a requirement that management rotate employees among positions violated Section 7106(a)(2)(A), found that a requirement that an employee be rotated through the duties of his position on a weekly basis violated Section 7106(a)(2)(B).

> [E]ven if the union intended only that employees be rotated to the various duties within their own position description, the specific language of the proposal at issue would require all employees to be rotated each week regardless whether any work were available which required the performance of such duties or whether the work previously assigned had been completed. In other words, the manager would be restricted to making new assignments, or in modifying, terminating, or continuing existing ones as deemed necessary or desirable. Accordingly, the specific proposal at issue herein is outside the duty to bargain under the Statute. [Emphasis added.]

Proposals which restrict an agency's right to determine the content of performance standards and critical elements directly interfere with management's rights to direct employees and assign work under section 7106(a)(2)(A) and (B). Patent Office Professional Assoc. and Patent and Trademark Office, Washington, D.C., 47 FLRA 10 (1993); Nat'l Assoc. of Agriculture Employees and Animal and Plant Health Inspection Service, 49 FLRA 319 (1994). Proposals or Provisions that concern the assignment of specific duties to particular individuals also interfere with management's right to assign work. Patent and Trademark Office, 47 FLRA 10, 23 (1993).

For other cases involving management's right to assign work, *see* MTC and Navy, 38 FLRA 10 (1990); AFGE and Department of Labor, 26 FLRA 273 (1987); Int'l Fed. of Prof. and Tech. Engineers and Norfolk Naval Shipyard, 49 FLRA 225 (1994)(a proposal to require removal of any employee who tests positive for illegal drugs from the chain of custody of drug testing specimens found to interfere with management's right to assign work).

(b) Contracting Out. The right of unions to bring action under the Administrative Procedure Act (APA) challenging the agency's contracting out decision was denied in AFGE v. Brown, 680 F.2d 722 (11th Cir. 1982), *cert. denied*, 103 U.S. 728 (1983); *see also* NFFE v. Cheney, 883 F.2d 1038 (D.C. Cir. 1989). However,

the Sixth Circuit found that a contracting out decision was subject to judicial review under the APA. Diebold v. United States, 947 F.2d 787 (6th Cir. 1991), *petition for rehearing and rehearing en banc denied*, 961 F. 2d 97 (6th Cir. 1992).

The following case discusses the negotiability of proposals concerning contracting out.

NFFE Local 1214 and
U.S. Army Training Center and Fort Jackson, Fort Jackson, South Carolina

45 FLRA 1222 (1992)

(Extract)

I. Statement of the Case

This case is before the Authority on a negotiability appeal filed by the Union under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). The appeal concerns the negotiability of one proposal which provides that, when feasible, the Agency will contract out only when it would be economically efficient, effective to the Agency's mission, or in the best interests of the Government. For the following reasons, we find that the proposal is nonnegotiable.

II. Proposal

The Employer agrees that, when feasible, contracting out of its functions and/or missions should only occur when it is demonstrated that such contracting out would be economically efficient, effective to the mission, or in the best interest of the Federal Government.

III. Positions of the Parties

A. Agency

The Agency contends that the proposal directly and excessively interferes with its right under section 7106(a)(2)(B) to contract out. The Agency argues that the proposal does not merely require the Agency to comply with Office of Management and Budget (OMB) Circular A-76 but that the proposal "would remain in effect even if the OMB Circular is modified." Statement of Position at 3. According to the Agency, inclusion of the term "when feasible" does not render the proposal negotiable because, in the Agency's view, every contracting out decision "must comply with the proposal's requirement[s]. . . ." *Id.*

The Agency also contends that the proposal is not intended as an arrangement "to lessen the adverse affects" of a decision to contract out. *Id.* at 4. According to the Agency, the proposal "negates management's right to contract out and does not concern any arrangements for employees affected by the implementation of that right." *Id.* Moreover, the Agency argues that the proposal excessively interferes with management's right to contract out because it would "completely prohibit[] the [Agency] from contracting out work unless i[t] can be shown that doing so meets the restrictions contained in the proposal." *Id.*

B. Union

The Union contends that the Agency's right to contract out is restricted by applicable law and regulation, including OMB Circular A-76, and that, based on the Authority's decision in National Treasury Employees Union and U.S. Department of the Treasury, Internal Revenue Service, 42 FLRA 377 (1991) (IRS), *petition for review filed sub nom.* Department of the Treasury, Internal Revenue Service v. FLRA, No. 91-1573 (D.C. Cir. Nov. 25, 1991), such law and regulation may be enforced through arbitration. The Union claims that as OMB Circular A-76 requires that "all contracting-out . . . must be in the public interest[,] . . . efforts of this nature cannot be in the public interest when contracting-out is not found to be economically efficient, effective, or in the best interest of the Federal Government." Petition for Review at 2. According to the Union, "the proposal [does] not introduce or impose any limitation or restriction that is not already imposed upon the [A]gency through [applicable regulations]. . . ." Reply Brief at 3.

Finally, the Union states that the proposal is "not intended to address the specific or adverse impact associated with contracting out decisions[.]" *Id.* at 4. Rather, the Union states that it "possesses a number of options that have been negotiated, and are presently under negotiation, that are designed to address specific or adverse impact, or redress adverse impact suffered by employees when management applies or executes its 7106 rights in a legal, extraordinary, or extralegal manner." *Id.*

IV. Analysis and Conclusions

Proposals that establish substantive criteria governing the exercise of a management right directly interfere with that right. *See e.g.,* National Federation of Federal Employees, Local 2050 and Environmental Protection Agency, 36 FLRA 618, 625-27 (1990). However, insofar as management rights under section 7106(a) (2) are concerned, proposals that merely require compliance with applicable laws do not directly interfere with the exercise of such rights. IRS. The term "applicable laws" in section 7106(a) (2) includes, among other things, rules and regulations, including OMB Circular A-76, which have the force and effect of law. *Id.*

Consequently, proposals merely requiring compliance with OMB Circular A-76 do not directly interfere with management's right to contract out. American Federation on Government Employees, AFL-CIO, Department of Education Council of AFGE Locals and Department of Education, 42 FLRA 1351, 1361-63 (1991) (Department of Education); AFSCME Local 3097 and Department of Justice, Justice Management Division, 42 FLRA 587 (1991), *petition for review filed sub nom.* Department of Justice, Justice Management Division v. FLRA, No. 91-1574 (D.C. Cir. Nov. 25, 1991).

In this case, the disputed proposal permits the Agency to contract out only if the Agency can demonstrate that such action "would be economically efficient, effective to the mission, or in the best interest of the Federal Government." In this regard, we reject the Union's contention that, based on IRS, the proposal does not directly interfere with the Agency's right to contract out because it merely implements OMB Circular A-76. Nothing in the wording of the disputed proposal refers to or cites OMB Circular A-76 and we have no basis on which to conclude that the proposal constitutes a restatement of any provisions in the Circular. *Compare* Department of Education, 42 FLRA at 1361-63 (a proposal which obligated the agency to conform to a particular requirement of OMB Circular A-76 found not to directly interfere with the agency's right to contract out in circumstances where the proposal merely restated the requirement of the Circular and where the union stated that the proposal would no longer have any effect if the Circular were modified to remove the requirement in question). We find the Union's explanation of the proposal inconsistent with its plain wording and, as a result, we do not adopt the Union's explanation. *See e.g.,* National Association of Government Employees, Federal Union of Scientists and Engineers, Local R1-144 and U.S. Department of the Navy, Naval Underwater System Center, Newport, Rhode Island, 42 FLRA 730, 734 (1991).

We conclude that, by incorporating the standards of economic efficiency, mission effectiveness, and the best interests of the Government, the disputed proposal establishes substantive criteria governing the exercise of the Agency's right to contract out. Therefore, the proposal directly interferes with the Agency's right to contract out under section 7106(a)(2)(B) of the Statute. In reaching this conclusion we reject the Union's contention that inclusion of the phrase "when feasible" renders the proposal negotiable. The inclusion of such wording does not change the fact that management's discretion to contract out is restricted. *See* International Federation of Professional and Technical Engineers, Local 4 and Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 35 FLRA 31, 37-38 (1990).

Finally, it is clear that the disputed proposal is not intended to be an appropriate arrangement under section 7106(b) (3) of the Statute. In this

regard, the Union expressly states that its proposal is "not intended to address the specific or adverse impact associated with contracting out decisions[.]" Reply Brief at 4. According to the Union, it "possesses a number of options that have been negotiated, and are presently under negotiation, that are designed to address specific or adverse impact, or redress adverse impact suffered by employees when management applies or executes its 7106 rights in a legal, extraordinary, or extralegal manner." *Id.*

As the disputed proposal directly interferes with the Agency's right to contract out under section 7106(a)(2)(B) of the Statute, it is nonnegotiable. Accordingly, we will dismiss the Union's petition.

V. Order

The Union's petition for review is dismissed.

The Supreme Court was involved in resolving some of the issues relating to contracting out. The Court granted cert. in IRS v. FLRA, 862 F.2d 880 (D.C. Cir. 1989). The issue in this case concerned the union's ability to negotiate or grieve management's decision to contract out federal work. The proposal submitted by the union would have established the grievance and arbitration provision of the union's master labor agreement as the union's internal administrative appeal for disputed contracting out cases. The Court held the proposal was not negotiable. It stated that a union cannot try to enforce a rule or regulation through negotiated grievance procedures if the attempt affects the exercise of a management right unless the rule or regulation is "an applicable law." The Court remanded the case back to the D.C. Circuit. IRS v. FLRA, 110 S. Ct. 1623 (1990). The D.C. Circuit promptly remanded the case back to the FLRA, stating that the determination of whether Circular A-76 is an "applicable law" must be performed in the first instance by the FLRA. IRS v. FLRA, 901 F.2d 1130 (D.C. Cir. 1990).

On remand, the FLRA ruled that Circular A-76 is an "applicable law" and hence unions can challenge contracting out decisions through arbitration. NTEU and IRS, 42 FLRA 377 (1991). On review, the D.C. Circuit initially found that OMB Circular A-76 was an "applicable law" within the meaning of § 7106 and also found that the proposal was negotiable. IRS v. FLRA, 901 F.2d 1130 (D.C. Cir. 1990). As with the 4th Circuit case, this opinion was short lived. The court, meeting *en banc*, reversed its position and held that the provision was not negotiable. The court found that it was unnecessary to decide whether the Circular was an "applicable law" in order to determine whether it was negotiable. The court found the Circular to be a government wide regulation under § 7117(a) that specifically excluded the use of grievance and arbitration procedures. The court held,

> We hold that if a government-wide regulation under section 7117(a) is itself the only basis for a union grievance--that is, if there is no pre-existing legal right upon which the grievance can be based--and the regulation precludes bargaining over its implementation of prohibits grievances concerning alleged violations, the Authority may not require a government agency to bargain over grievance procedures directed at implementation of the regulation. When the government promulgates such a regulation, it will not be hoisted on its own petard.

IRS v. FLRA, 996 F.2d 880 (D.C. Cir. 1993).

(c) Personnel by Which Operations Are Accomplished. In Marine Corps Development and Education Command, 2 FLRA 422 (1980), the union proposed union representatives be made members of wage survey teams collecting data to be used in determining the wages of Nonappropriated Fund (NAF) administrative support and patron service employees. Although the agency had extended the right to participate on wage survey teams to unions representing crafts and trades employees, the right to participate on wage survey teams gathering wage data to be used in determining the pay of administrative support and patron service employees was not similarly extended. The agency argued that the union's proposal interfered with management's right, under Section 7106(a)(2)(B), to determine the personnel by which its operations were conducted; that is, the agency was contending that the wage survey team constituted an operation of the agency. The Authority disagreed.

> [I]rrespective of whether the use of such wage survey teams constitute a part of the operation of the agency or is a procedure by which the pay determination operation is carried out, nothing in the disputed provision would interfere with the agency's right to determine the personnel who will represent the agency's interests on such wage survey teams. The union's proposal merely provides that there will be union representation on such already established wage survey teams. [Emphasis in original.]

The Authority added that the disputed provision was consistent with the public policy, as expressed in 5 U.S.C. § 53(c)(2), of providing for unions a direct role in the determination of pay for certain hourly-paid employees.

(4) With respect to filling positions, to make selections for appointments from--(i) among properly ranked and certified candidates for promotions; or (ii) any other appropriate source--Section 7106(a)(2)(C).

In VA, Perry Point, 2 FLRA 427 (1980), the union proposal in dispute read as follows:

> It is agreed that an employer will utilize, to the maximum extent possible the skills and talents of its employees. Therefore, consideration will be

> given in filling vacant positions to employees within the bargaining unit. Management will not solicit applications from outside the minimum area of consideration or call for a Civil Service Register of candidates if three or more highly qualified candidates can be identified within the minimum area of consideration. This will not prevent applicants from other VA field units applying provided they specifically apply for the vacancy being filled, and that they are ranked and rated with the same merit promotion panel as local employees.

The Authority concluded that the proposal, despite express language to the contrary, would not prevent management from expanding the area of consideration once the minimum area was "considered and exhausted as the source of a sufficient number of highly qualified candidates."

In Navy Exchange, Orlando, 3 FLRA 391 (1980), the Authority was faced with another proposal seeking to restrict management's ability to consider outside applicants. The disputed proposal provided that management could consider outside applicants only when less than three minimally qualified internal applicants were being considered. It also provided that management could engage in external recruitment only when it was determined that none of the internal applicants were qualified.

The agency argued that the proposal would negate management's right, under 5 U.S.C. § 7106(a)(2)(C), to select from among properly ranked and certified candidates for promotion or from any other appropriate source. The agency also argued that the proposal would require the promotion of an internal unit employee if three minimally qualified employees were available. This interpretation was adopted by the Authority for the purpose of its decision. The FLRA held that the proposal violated section 7106(a)(2)(C).

> The proposal here involved, which would restrict management's right to consider properly ranked and certified candidates for promotion or outside applicants . . . would infringe upon the right to select.

The Authority distinguished this case from Perry Point by noting that the Perry Point proposal, in requiring only that consideration be given to unit employees, did not prevent management from exercising its reserved right to select. The Authority added that, to the extent the proposal required selection of unit employees if there were three minimally qualified employees, it, like the CSA case, would conflict with 5 U.S.C. § 7106(a)(2)(C).

A union proposal to include one union member on a three member promotion-rating panel for specific unit vacancies was held non-negotiable in AFGE, Mint Council 157 and Bureau of the Mint, 19 FLRA 640 (1985). The FLRA reasoned that the provision would interject the union into the determination of which employees would be selected for promotion, thus interfering with management's right to select under section 7106(a)(2)(c).

In ACT New York State Council and State of New York, Division of Military and Naval Affairs, 45 FLRA 17 (1992), the FLRA found that a union proposal which "substantively limits the Agency's right to determine the extent to which experience as a part-time military member of the National Guard satisfies qualification requirements for civilian position" was not negotiable. *Id.* at 20.

(5) Right to take actions necessary to carrying out agency mission during emergencies--section 7106(a)(2)(D).

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 350 and ARMY CORPS OF ENGINEERS, ST. LOUIS, MISSOURI
1999 FLRA LEXIS 40; 55 FLRA No. 243 (1999)

(Summary of the Case)

This case went before the FLRA on a petition for review of negotiability issues filed by the union under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute. The petition concerns one provision that was disapproved by the Agency. That provision defines the circumstances under which an emergency exists for the purposes of determining when the parties may temporarily circumvent compliance with other provisions of their collective bargaining agreement. For the purpose of the agreement, the word “emergency” was defined as “a temporary condition posing a threat to human life or property including the reliability and integrity of the Cannon Power Plant.”

Consistent with existing precedent, the Army Corps of Engineers argued that any provision or proposal that defines the word “emergency”, other than its plain meaning, unlawfully affects management’s right to determine how to carry out the agency’s mission in an emergency. According to the Army, such a provision would violate section 7106(b)(2)(D) of the Federal Service Labor-Management Relations Statute.

The union asserted that the purpose of the provision was to define the type of emergency situations in which the parties could “temporarily circumvent other provisions of the agreement.”

The FLRA reversed its earlier precedent, holding:

> Both parties interpret the foregoing precedent as establishing that *any* definition of the term "emergency" affects the right to take action during an emergency. Our examination of these decisions confirms this interpretation. *See, e.g.*, National Guard

> Bureau, 49 FLRA at 876 (Authority stated that "Provisions that define 'emergency' [affect] management's right under section 7106(a)(2)(D) to take whatever actions may be necessary to carry out the agency mission during emergencies"). That is, Authority precedent finds that definitions of "emergency" affect management's right without regard to the content of the definition.
>
> The Union requests the Authority to reconsider this precedent. On reconsideration, we find no basis in the wording of the Statute, and no expressed rationale in the Authority precedent, on which to conclude that all definitions of "emergency" -- whatever their content -- affect management's right. Instead, the same inquiry used to resolve management-rights-based negotiability disputes regarding other provisions, i.e., whether the provision is contrary to the management right at issue, should be employed. Insofar as previous precedent holds to the contrary, it will no longer be followed.

This is the first case in which the Authority ruled that the term “emergency” is now negotiable and that previous FLRA decisions holding that defining the word “emergency” per se affects a management right would no longer be followed.

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d. Permissive/Optional Areas of Negotiation. Numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work.

This section is the successor to section 11(b) of E.O. 11491. Management may refuse to discuss a permissive subject of bargaining, or it may negotiate on such a matter at its discretion, § 7106(b)(1). Management may terminate negotiations on a permissive subject any time short of agreement, National Park Service, 24 FLRA 56 (1986). In this regard, certain excerpts from the floor debate in the House may be helpful:

> Mr. Ford of Michigan . . . I might say that not only are they [Management] under no obligation to bargain [on a permissive subject], but in fact they can start bargaining and change their minds and decide they do not want to talk about it any more, and pull it off the table. It is completely within the control of the agency to begin discussing the matter or terminate the discussion at any point they wish without conclusion, and

there is no appeal or reaction possible from the parties on the other side of the table.

It is completely, if you will, at the pleasure and the will of the agency.

. . . .

Once agreement has been reached on a permissive subject, the agency head may not refuse to approve the agreement provision on the basis that there was no obligation to bargain on the subject. *See* National Park Service, 24 FLRA 56 (1986);

Activities renegotiating a collective bargaining agreement may attempt to eliminate provisions found in the earlier contract. The union may be reluctant to give up rights they have already obtained and will often assert that management may not declare those provisions which address permissive subjects nonnegotiable. The Federal Labor Relations Authority has stated that management is under no obligation to negotiate permissive subjects even if it has done so in earlier agreements. FAA, Los Angeles and PASS, Local 503, 15 FLRA 100 (1984).

On 1 October 1993, President Clinton issued an executive order directing the heads of each agency to, "negotiate over the subjects set forth in 5 U.S.C. § 7106(b)(1), and instruct subordinate officials to do the same . . . ." Exec. Order No. 12,871, 58 Fed. Reg. 522201 (1993). However, on 17 February 2001, President Bush issued Executive Order 13,203[3] which revoked Executive Order 12,871. OPM guidance states that Executive Order 13,203[4] abolished both the requirement to form labor-management partnerships and the previous mandate to bargain on matters covered by 5 U.S.C. §7106(b)(1).[5]

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(1) The Numbers, Types, and Grades of Employees or Positions Assigned to Any Organizational Subdivision, Work Project, or Tour of Duty (commonly called "Staffing Patterns").

The Authority has defined this phrase to mean "the establishment of staffing patterns, or allocation of staff, for the purpose of an agency's organization and the accomplishment of its work." National Association of Government Employees, Local R5-184 and U.S. Department of Veterans Affairs, Medical Center, Lexington, Kentucky, 52 FLRA 1024, 1030-31 (1997).

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[3] *Available at* www.whitehouse.gov/news/releases/2001/02/2001.htm.

[4] *Available at www.whitehouse.gov*/news/releases/2001/02/2001.htm.

[5] *Available at* www1.opm.gov/lmr/guide413203.htm. *See also* Field Advisory Service Memorandum, Executive Order 13203 – Revocation of Executive Order 12871 and Presidential Memorandum Concerning Labor-Management Partnerships, undated.

This permissive subject area involves the distribution and composition of the work force within the overall employee complement. Generally, if the proposal addresses the number of employees in an organizational subdivision, it falls within this section. Proposals that address the types or grades of employees within a subdivision are likewise not negotiable. The following case is helpful in understanding how proposals relating to the types and grades of employees can arise during negotiations.

OVERSEAS EDUCATION ASSOCIATION and
U.S. DEPARTMENT OF DEFENSE OFFICE OF DEPENDENTS SCHOOLS
45 FLRA 1185 (1992)

(Extract)

* * *

IV. Proposal 6

7.A. In the event a local hire employee meets the criteria of 1400.25m and the JTR Volume II (i.e., death, legal separation, divorce, etc.) an excepted appointment with condition shall be retroactively granted to the beginning of the school year.

Proposal 7

7.B. If a local hire employee is employed on or before November 1 of each year, he/she shall be retroactively given an excepted appointment with condition unless eligible for without condition.

A. Positions of the Parties

1. Agency

The Agency states that locally hired employees initially are hired on a temporary basis. The Agency asserts that their "temporary appointments have a 'not to exceed' date upon which the appointment expires, normally at the end of the school year." Statement at 13. The Agency further asserts that at the end of the temporary appointment, the Agency may: (1) terminate the temporary appointment; (2) reappoint the employee to another "temporary appointment not to exceed"; or (3) convert the employee to an excepted (permanent) appointment with condition providing that a continuing permanent position exists and the employee's performance is satisfactory. *Id.* at 13-14.

The Agency contends that Proposal 6 would "require management to convert (that is, appoint) locally hired temporary employees to permanent positions, and to make these appointments retroactive to the beginning [of] the school year." Id. at 14. The Agency asserts that the proposal would "dictate to the [A]gency the type of positions and/or employees (temporary v. permanent) necessary to accomplish its mission." *Id*. The Agency contends that proposals which concern the numbers, types and grades of positions and/or employees assigned to an organization are negotiable under section 7106(b)(1) of the Statute only at the election of the Agency. The Agency asserts that it has elected not to negotiate on Proposal 6 and, therefore, the proposal is nonnegotiable.

The Agency asserts that Proposal 7 is nonnegotiable for the same reasons as Proposal 6. Additionally, the Agency contends that Proposal 7 is contrary to Federal Personnel Manual (FPM) chapter 296, subchapter 1, which provides "that no personnel action can be made effective prior to the date on which the appointing officer approves the action." Id. at 15. According to the Agency, FPM chapter 296, subchapter 2 outlines the exceptions to this requirement. The Agency contends that because Proposal 7 would require it to make "an appointment retroactive" absent the exceptions identified in the FPM, the proposal is inconsistent with the FPM chapter 296, subchapter 1, which is a Government-wide regulation. Id.

2. Union

In its petition, the Union asserted that Proposals 6 and 7 "would establish the process for determining when an appointment management has decided to make would become effective." Petition at 3. Subsequently, in its response, the Union explains that Proposals 6 and 7 "provide for additional times when an appointment to a temporary position may be converted to an Excepted Appointment-Conditional." Response at 8. According to the Union, DODD Number 1400.13 "covers when a fully qualified educator who has been appointed to a temporary position with [the Agency] will be converted to an Excepted Appointment-Conditional." Id. The Union states that "[c]onversion of fully qualified appointed employees under these regulations occurs as a result of specific triggering events and the passage of specified amounts of time." *Id.* at 8-9. The Union asserts that the proposals "provide for additional triggering events and periods of time for when conversion of a temporary appointment to an Excepted Appointment-Conditional would be permitted." *Id*. at 9. The Union contends that the appointment procedures for teachers are not "so specifically provided for" in 20 U.S.C. s 902 as to be excluded from the definition of conditions of employment under section 7103(a)(14)(C) of the Statute. *Id.*

B. Analysis and Conclusions

We find that Proposals 6 and 7 are nonnegotiable.

We note that Proposal 6 refers to "the criteria of 1400.25m and the JTR Volume II...." However, the record does not contain a copy of DODD Number 1400.25m or an appropriate reference to JTR Volume II. The Union provided only a copy of DODD Number 1400.13. Noting that DODD Number 1400.13 covers when a fully qualified educator who has been appointed to a temporary position will be converted to a permanent-conditional position, the Union explains that Proposals 6 and 7 provide for additional situations and time periods that would "trigger[ ]" the conversion of a temporary appointment to a permanent- conditional appointment. Union's Response at 9. The Agency asserts that the proposals require management to convert locally hired temporary employees to permanent positions, and to make these appointments retroactive to the beginning of the school year. Locally hired employees are educators appointed in an overseas area. Based on the parties' positions and the wording of Proposals 6 and 7, it is our view that the proposals are intended to: (1) establish additional criteria requiring the conversion of locally hired employees on temporary appointments to permanent-conditional positions; and (2) make such appointments retroactive to the beginning of the school year.

Under section 7106(b)(1) of the Statute, an agency has the right to determine the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty. In our view, determinations as to whether an employee holding a temporary appointment should be converted to or granted a permanent position in the Agency are matters directly related to the numbers, types and grades of employees or positions assigned to its organizational subdivisions, work projects, or tours of duty. *See, for example*, National Treasury Employees Union and Department of Health and Human Services, Region X, 25 FLRA 1041, 1051-52 (1987) (proposal requiring an agency, in certain circumstances, to convert full-time employees to part-time status found nonnegotiable because the determination as to use of part- time employees to perform the work of the agency is a matter directly related to the numbers, types, and grades of employees or positions assigned to an agency's organizational subdivisions, work projects, and tours of duty); National Federation of Federal Employees, Local 1650 and U.S. Forest Service, Angeles National Forest, 12 FLRA 611, 613 (1983) (proposal requiring an agency "to attempt to work all WAE employees for as many of non-guaranteed pay periods as available financing will allow" held nonnegotiable because it concerned the agency's right under section 7106(b)(1) of the Statute to determine the numbers, types, and grades of employees). *See also* American Federation of Government Employees, Local 1923 and U.S. Department of Health and Human Services, Health

Care Financing Administration, Baltimore, Maryland, 44 FLRA 1405, 1457-58 (1992), *petition for review filed*, No. 92-1307 (D.C. Cir. July 24, 1992).

Under Proposals 6 and 7, if a temporary employee meets the specified criteria, management would be obligated to convert the employee's status from a temporary appointment to a permanent-conditional position, even if management decided that to do so would make its staffing patterns incompatible with its operational needs. The proposals would restrict management's decision as to the mix of specific types of employees, namely, temporary and permanent, that it will assign to various organizational subdivisions, in this case, local schools. Accordingly, we conclude that the proposals directly interfere with management's right to determine the numbers, types, and grades of employees or positions assigned to an organizational subdivision under section 7106(b)(1) of the Statute. In view of this determination, we need not reach the Agency's contention that Proposal 7 conflicts with a Government-wide regulation.

We further note that the Union has not asserted that Proposals 6 and 7 constitute appropriate arrangements under section 7106(b)(3) of the Statute.

Accordingly, based on the above, we conclude that Proposals 6 and 7 are nonnegotiable.

V. Order

The petition for review is dismissed.

In determining whether a matter concerning changes in employees' hours of work is within the scope of section 7106(b)(1), the Authority previously made distinctions between: (1) changes in employees' hours of work which were integrally related to and consequently determinative of the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty (*see e.g.,* National Federation of Federal Employees, Local 1461 and Department of the Navy, U.S. Naval Observatory, 16 FLRA 995 (1984); U.S. Customs Service, Region V, New Orleans, Louisiana, 9 FLRA 116, 117 (1982)); and (2) changes which permit "a modicum of flexibility within the range of starting and quitting times for [an] existing tour of duty" National Treasury Employees Union, Chapter 66 and Internal Revenue Service, Kansas City Service Center, 1 FLRA 927, 930 (1979); *see also* U.S. Customs Service, Region V, 9 FLRA at 118-19. As to the former category of cases, the changes in employees' hours of work were found to be outside the duty to bargain; as to the latter category, the changes in hours were found to be within the duty to bargain. It has been noted that these distinctions are subtle ones. *See* Veterans Administration Medical

Center, Leavenworth, Kansas, 32 FLRA 124, Judge's Decision at 842 (1988); National Treasury Employees Union v. FLRA, 732 F.2d 703 (9th Cir. 1984).

In Scott Air Force Base v. FLRA, 33 FLRA 532 (1988), the authority clarified the bargaining obligations with respect to changes in employees' hours of work. The authorities founded that the distinctions previously used are not supported by the relevant statutory and regulatory provisions.

An employee's daily tour of duty, stated the Authority, consists of the hours that the employee works; that is, from the time when the employee starts work until he or she ends work. A decision as to what will constitute an employee's tour of duty is a decision by management as to when and where an employee's services can best be used. When an agency changes an employee's hours, that change, under applicable statutory and regulatory provisions, results in a new tour of duty for the employee. The degree of the change--whether it is a 1-hour change or an 8-hour change--does not alter the fact that the change results in a new tour of duty for the employee. A change in employees' starting and quitting times is a change in their tours of duty.

Changes in employees' tours of duty affect the "numbers, types, and grades of employee . . . assigned to . . . [a] tour of duty" within the meaning of section 7106(b)(1) of the Statute. To the extent that previous decisions of the Authority are to the contrary, they will no longer be followed.

Consistent with the statutory and regulatory provisions discussed above, agencies must generally give appropriate notice to employees of changes in their tours of duty. Further, the fact that an agency's decision to change employees' tours of duty is negotiable only at the agency's election should not be viewed as encouraging agencies not to bargain over these changes. Moreover, even where an agency exercises its right under section 7106(b)(1) not to bargain over the change itself, an agency has an obligation to bargain over the matters set forth in section 7106(b)(2) and (3) of the Statue: procedures to be observed by management in exercising its authority and appropriate arrangements for employees adversely affected by management's exercise of its authority.

In some instances, bargaining over flexible work schedules has been specifically authorized by statute. *See e.g.,* American Federation of Government Employees, Local 1934 and Department of the Air Force, 3415 ABG, Lowry AFB, Colorado, 23 FLRA 872 (1986). Those instances are not affected by the decision in 33 FLRA 532 (1988).

(2) Technology, Methods and Means of Performing Work.

(a) Technology. Technology is the method of execution of the technical details of accomplishing a goal or standard.

(b) Methods and Means of Performing Work. These were previously prohibited subjects of bargaining under the Executive Order.

> Method "The Authority has construed 'method' as referring to the way in which an agency performs its work." NTEU Chapter 83 and IRS, 35 FLRA 398, 406 (1990)..
>
> Means "[I]n the context of section 7106(b)(1), [means] refers to any instrumentality, including an agent, tool, device, measure, plan, or policy used by the agency for the accomplishing or the furthering of the performance of its work." NTEU and Customs Service, Region VIII, 2 FLRA 255, 258 (1979).

In Customs Region 8, 2 FLRA 254 (1979), the Authority agreed with the agency's contention that "the activity's requirement that uniformed employees wear nameplates while performing duties as customs officers is a decision as to the means of performing the agency's work." It further held that a proposal making the wearing of nameplates voluntary was not a bargainable appropriate arrangement because such an arrangement "would, in effect, empower employees to nullify the [nameplate] experiment."

The report of the House and Senate conferees states that while there might be circumstances when it would be desirable to negotiate on an issue in the methods and means area, it is not intended that agencies will discuss general policy questions determining how an agency does its work. The language must be construed in light of the paramount right of the public to an effective and efficient Government as possible. For example, the phrase "methods and means" is not intended to authorize IRS to negotiate with a labor organization over how tax returns should be selected for audit, or how thorough the audit of the returns should be.

The conferees went on to give other examples: EPA may not negotiate about how it would select recipients for environmental grants, nor may the Energy Department bargain over which of its research and development projects should receive top priority. OPM considers the intent of Congress to be that these examples are so closely related to agency "mission" as to be prohibited from bargaining.

In Oklahoma City Air Logistic Center, 8 FLRA 740 (1982), management committed a ULP by unilaterally changing existing conditions of employment regarding a policy on facial hair and respirator use without giving notice and opportunity to bargain to the union on the change. The Authority rejected management's contention that the change involved "technology, methods, and means of performing work" within the meaning of section 7106(b)(1). The issue was not about respirator use per se, but rather the effect of a change in facial hair policy on unit employees required to use the respirator. On a remand from the 9th Circuit, the Authority likewise found a union proposal on agency pay check distribution procedure to be a mandatory topic of

bargaining, in spite of precedent holding it was a permissive matter because it involved a method or means of performing work. Mare Island Naval Shipyard, 25 FLRA 465 (1987).

Distinguishing between "mission" (prohibited) and "methods and means" (permissive) may be quite difficult in some cases. However, management should never consider negotiating whenever a permissive proposal involves basic policy choices with respect to priorities and overall efficiency and effectiveness. "Methods and means" are removed from basic policy; they relate more to the techniques, procedures, plans, tools, etc., used to accomplish policy goals.

Once an agreement is reached on a proposal that is both a prohibited topic of negotiation under § 7106(a) and a permissive topic under § 7106(b)(1), the rules governing permissive topics will control and the proposal may not be declared non-negotiable. Assoc. of Civilian Technicians, Montana Air Chapter No. 29 v. FLRA, 22 F.3d 1150 (D.C. Cir., 1994) This case resolved a long standing dispute about the interaction between the two sections of 7106. The court said the clear language in 7106(a) "Subject to subsection (b) of this section" established that § 7106(b) was an exception to the management rights provisions. *See also* NAGE and DVA Medical Center, Lexington, Kentucky, 51 FLRA 386 (1995).

If the proposal concerns matters that are governed by both § 7106(a) and § 7106(b)(1), and the proposal's provisions or requirements are inseparable, the Authority will determine which of the proposal's requirements is dominant. The dominant requirement in a proposal is the requirement upon which the rest of the proposal depends for its viability. Negotiability is determined based upon that dominant requirement. AFGE Local 1336 and SSA, Mid-America Program Service Center, 52 FLRA 794 (1996).

e. Mid-Contract Bargaining/Unilateral Changes.

(1) Overview. The obligation to negotiate does not end when the collective bargaining agreement is signed. Whenever management is to make a change concerning a matter which falls within the scope of bargaining, the exclusive representative must be given notice of the proposed change and given an opportunity to negotiate if the change results in an impact on unit employees, or such impact was reasonably foreseeable. U.S. Government Printing Office, 13 FLRA 39 (1983).

If the matter is not addressed in the collective bargaining agreement, the union must be given reasonable notice of the proposed change and an opportunity to negotiate. If the union indicates it does not desire to negotiate the matter or fails to respond within a reasonable time, the decision may be implemented. If the union desires to negotiate the matter the parties must negotiate and reach agreement or initiate impasse procedures. *See* Scott AFB and NAGE, 5 FLRA 9 (1981).

On 28 February 2000, the FLRA issued an opinion that now requires the agency to collectively bargain a union-initiated proposal if the parties did not negotiate the issue when forming the existing collective bargaining agreement. United States Department of the Interior and National Federation of Federal Employees, Local 1309, 56 FLRA 45 (2000), request for reconsideration denied, 56 FLRA No. 38 (2000). An excerpt from the case is reproduced below.

U.S. DEPARTMENT OF THE INTERIOR WASHINGTON, D.C. AND U.S. GEOLOGICAL SURVEY RESTON, VIRGINIA and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309

56 FLRA 45 (2000)

FEDERAL LABOR RELATIONS AUTHORITY

OPINION:

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IV. Analysis and Conclusions

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B. Proposals Requiring Union-Initiated Midterm Bargaining Are Within the Duty to Bargain under the Statute

The litigation of this case has focused on the question of whether proposals requiring midterm bargaining in certain situations are within an agency's obligation to bargain. The Supreme Court concluded that Congress has delegated to the Authority the power to determine the extent to which midterm bargaining (or bargaining over midterm bargaining, as specifically at issue here) is required under the Statute. NFFE and FLRA v. Interior, 119 S. Ct. at 1007. For the reasons explained below, we find that the Union's proposal is negotiable for two reasons. First, we conclude that under the Statute, agencies are obligated to bargain during the term of a collective bargaining agreement on negotiable union proposals concerning matters that are not "contained in or covered by" the term agreement, unless the union has waived its right to bargain about the subject matter involved; thus, the Union's proposal is within the duty to bargain because it restates a statutory obligation. Second, the proposal is not otherwise inconsistent with federal

law or government-wide regulation, and is therefore within the Survey's duty to bargain.

1. Agencies Are Required to Bargain over Union-Initiated Midterm Proposals

a. Requiring Agencies to Bargain over Union-Initiated Midterm Proposals Is Consistent with Congress's Commitment to Collective Bargaining in the Federal Sector

. . . Congress has unambiguously concluded that collective bargaining in the public sector "safeguards the public interest," "contributes to the effective conduct of public business," and "facilitates and encourages the amicable settlements of disputes." 5 U.S.C. § 7101(a)(1). Nothing in the plain wording of the Statute supports the inference that these conclusions are not as applicable to midterm bargaining as they are to term bargaining. In that regard, the Supreme Court has noted that "collective bargaining is a continuing process" involving, among other things, "resolution of new problems not covered by existing agreements." Conley v. Gibson, 355 U.S. 41, 46 (1957).

As argued by the General Counsel, the Charging Party and a number of amici, matters appropriate for resolution through collective bargaining are sometimes unforeseen and unforeseeable at the time of term negotiations. These matters include not only problems that might arise because of a change in workplace environment, but also new areas of agency discretion occasioned by changes in law or regulations. For example, when agencies were authorized to provide a portion of premiums for employee liability insurance, the National Treasury Employees Union was able to raise the issue midterm rather than have to wait for either management to initiate action or for the next round of term negotiations. Charging Party Brief, Affidavit of Director of Negotiations for the National Treasury Employees Union at 2. Such bargaining furthers the Statute's goal of enabling employees, "through labor organizations of their own choosing" to more timely participate in "decisions which affect them" and in cooperatively resolving disputes. 5 U.S.C. § 7101(a)(1). Moreover, the negotiation of such workplace issues is preferable to addressing them through the more adversarial grievance/arbitration process, as suggested by one amicus. Brief of William C. Owen at 9.

. . . Further, the Supreme Court has recognized that "in passing the Civil Service Reform Act, Congress unquestionably intended to strengthen the position of federal unions and make the collective-bargaining process a more effective instrument of the public interest . . . ." Bureau of Alcohol, Tobacco & Firearms v. FLRA, 464 U.S. 89, 107 (1983); *see also* AFGE v. FLRA, 750 F.2d at 148 ("equalizing the positions of labor and management at the bargaining table" is a primary goal of the Statute). Consistent with those

goals, Congress has defined the obligation to bargain as "mutual." U.S.C. § 7103(a)(12). It is undisputed that the parties must bargain over an agency employer's proposed changes in conditions of employment midterm, whether the proposed change involves the exercise of the management rights set forth in section 7106(a) of the Statute, or matters that are fully negotiable. Requiring an agency, during the term of an agreement, to bargain over a union's proposed changes in negotiable conditions of employment thus maintains the mutuality of the bargaining obligation prescribed in the Statute. Because this requirement serves to equalize the positions of the parties, we disagree with our dissenting colleague's determination that "a counterbalance ... is appropriate" to the union's right to engage in midterm bargaining. Dissent at 31. With respect to negotiable conditions of employment, the rights and obligations of the unions and the agencies already are equivalent. And as the D.C. Circuit has recognized, collective bargaining, including midterm bargaining, is in the public interest because it "contributes to stability in federal labor- management relations and effective government." NTEU v. FLRA, 810 F.2d at 300.

. . . In addition, permitting unions to raise issues at the time they arise or become a priority for the parties serves the public interest in a more efficient Government because it will likely lead to more focused negotiations. As noted above, the ability to bargain over such issues in a timely manner is preferable to the alternative of leaving potentially important concerns unaddressed for perhaps a period of years until term negotiations on the basic contract commence again. Moreover, requiring unions to raise matters that do not currently present problems, but might do so in the future, could unnecessarily and inefficiently broaden and prolong term negotiations. That is, by permitting unions to raise certain matters midterm, the term negotiations will, in our view, proceed more efficiently in addressing existing and primary problems, and there will be no requirement to bargain over remote and secondary issues that do not appear to raise immediate concerns.

For all these reasons, we find that requiring agencies to bargain over union-initiated midterm proposals furthers Congress's goal of promoting and strengthening collective bargaining in the federal workplace.

b. Union-Initiated Midterm Bargaining Will Not Cause Inefficiency in Government

Mindful of Congress's admonition in section 7101(b) that the Statute should be interpreted in a manner consistent with an effective and efficient government, it is appropriate that we consider whether the benefits for collective bargaining found above are outweighed by potential costs and disruptions to government operations. In that regard, amici, relying on and replicating arguments addressed with approval by the Fourth Circuit in SSA v. FLRA, assert that: unions will attempt to gain a tactical advantage by

withholding proposals during term contract negotiations and then later pressing matters piecemeal during the term of the basic contract (Brief for Pension Benefit Guaranty Corporation at 2; Brief for Social Security Administration at 6-7); there will be a significant number of midterm negotiations involving less important issues that will ultimately have to be resolved by the Panel (Brief for Pension Benefit Guaranty Corporation at 2); and this dispersal of the collective bargaining process will destabilize labor relations and increase costs as a result of rolling or continuous bargaining (Brief for the Department of the Navy at 4; Brief for Kansas National Guard at 1; Brief for Pension Benefit Guaranty Corporation at 1; Brief for Social Security Administration at 3-4).

. . . For the reasons that follow, we find that the evidence in the record before us supports the conclusion that requiring agencies to bargain over union-initiated midterm proposals will not result in significant costs or disruptions that would outweigh the benefits of such bargaining. This evidence includes the lack of litigation over midterm bargaining issues, the actual experience of the parties, and the legal constraints on the scope of midterm bargaining.

With regard to litigation, review of Authority decisions reveals that only a few agencies have resisted the Authority's established position on the obligation to bargain midterm. Specifically, since 1987, when the Authority issued its decision in IRS II establishing that agencies are obligated to bargain over union-initiated midterm proposals, the Authority has been presented with only three cases, outside of the geographical confines of the Fourth Circuit, where agencies have been found to have violated the Statute by refusing to engage in midterm bargaining. These three cases comprise substantially less than one percent of the unfair labor practice cases resolved by the Authority during the same period. Further, during this same 12-year period, there have been only seven reported instances (approximately one percent of the Panel's reported decisions during that period) where the Panel has been obliged to resolve union-initiated midterm disputes. In addition, according to the General Counsel, midterm bargaining is a dispositive issue in less than one percent of unfair labor practice charges filed. General Counsel Brief at 11. We agree with the General Counsel's assertion that the lack of litigation suggests that union-initiated midterm bargaining is either infrequent or that it is not a significant area of concern for the parties.

. . . Further, although the reported experience with union-initiated midterm bargaining is limited, it supports the conclusion that such bargaining has not and will not lead to continuous bargaining. According to NTEU's Director of Negotiations, in a nationwide bargaining unit of approximately 98,000 employees, the union has initiated midterm bargaining on 12 occasions in the past 10 years. Charging Party Brief, Affidavit of Director of Negotiations for the National Treasury Employees Union at 1.

On the other hand, the record is devoid of probative evidence of excessive

costs or disruption to agency operations as a result of union-initiated midterm bargaining. To establish the significant costs of bargaining on official time, Amicus Social Security Administration submitted the Office of Personnel Management's Report on the use of official time for the first six months of 1998. However, that report sheds no light on the costs associated with midterm bargaining because the report only shows the amount of official time involved in "negotiations." There is no way of extracting from that data any information on the use of official time for midterm bargaining, let alone union-initiated midterm bargaining.

In addition, constraints on union-initiated midterm bargaining make it unlikely that it will lead to continuous issue-by-issue bargaining. First, an agency is not required to bargain during the term of a collective bargaining agreement on matters that are "contained in or covered by" an agreement. IRS II, 29 FLRA at 166. The framework to determine whether a matter is "contained in or covered by" an agreement is established in SSA, Baltimore, 47 FLRA at 1018 (examining "whether the matter is expressly contained in" or "'inseparably bound up with and . . . thus [is] plainly an aspect of . . . a subject expressly covered by the contract'" (citations omitted)). And, as the Authority noted in SSA, Baltimore, the "contained in or covered by test" balances the need for stability and the flexibility to address new matters. Id. at 1016-18. Some amici, agreeing with the Fourth Circuit's analysis, have suggested that unions will evade the "contained in or covered-by" limitation by withholding matters from term negotiations. These suggestions rely on the incorrect premise that unions have the ability unilaterally to control the breadth and scope of matters that will be included in a basic labor contract. Rather, during term negotiations either party has the ability and the right to bargain over any condition of employment, and it is an unfair labor practice for the other to refuse to engage in bargaining over such negotiable matters. *See* American Federation of Government Employees, Interdepartmental Local 3723, AFL-CIO, 9 FLRA 744, 754-55 (1982), *aff'd*, 712 F.2d 640 (D.C. Cir. 1983) (union commits unfair labor practice when it refuses to bargain over mandatory subject of bargaining).

. . . Second, an agency is not required to bargain midterm where the union has waived its right to bargain over the subject matter involved. Waivers of bargaining rights may be established by express agreement or by bargaining history. IRS II, 29 FLRA at 166. The test to analyze whether there has been a waiver by bargaining history is set out in Selfridge National Guard Base, 46 FLRA at 585 (examining whether matter has been "fully discussed and consciously explored during negotiations" and whether union has "consciously yielded or otherwise clearly and unmistakably waived its interest in the matter"). The conclusion that the covered-by and waiver doctrines have heretofore adequately regulated midterm bargaining is supported by the infrequency of midterm bargaining-related litigation.

In sum, arguments that union-initiated midterm bargaining has been or will be

harmful to the federal sector labor relations program in general, or individual labor and management relationships in particular, are unsupported and speculative. Finding that midterm bargaining is consistent with Congress's commitment to collective bargaining in the federal sector, we hold that agencies are obligated to bargain during the term of a collective bargaining agreement on negotiable union proposals concerning matters not "contained in or covered by" the existing agreement unless the union has waived its right to bargain about the subject matter involved.

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(2) Notice Requirements. Management has a duty to give adequate prior notice to the union of changes in conditions of employment. Failure to do so is, by itself, an unfair labor practice. In Newark Air Force Logistics Command, 4 FLRA 512 (1980), the FLRA ruled that even though the union had actual knowledge of a proposed change, the activity did not give appropriate advance notice of the change to the union, as a union. This was the result of the presence of a union steward as an employee, not as a union representative, at a meeting discussing a proposed change in working conditions. This ruling was overturned by the Sixth Circuit Court of Appeals. According to the court, the Authority's apparent attempt to prevent employers from changing working conditions before the unions have a chance to react may be valid. But, the court stated that the FLRA should take this action through a policy statement or regulation, not through a case decision where the facts show that the employer provided adequate notice. The court further stated that "labor statutes such as the one at issue here are designed, in part, to smooth labor-management relations by providing informal mechanisms to guide the operation of the workplace and the resolution of disputes. The Authority's decision appears to inject needless formality into that process." Air Force Logistics Command, Aerospace Guidance and Metrology Center, Newark, Ohio v. Federal Labor Relations Authority, 681 F.2d 466 (6th Cir. 1982).

Notice of proposed changes in conditions of employment must be "adequate." What constitutes "adequate" prior notice will vary depending on the nature of the proposed change. The probable impact of a major reorganization, for instance, is greater than the probable impact of a decision to schedule the downgrading of two positions after they are vacated. The former warrants earlier notice than the latter. One should distinguish between the notice given the union of a proposed change in working conditions and a notice given a bargaining unit at impasse of intent to implement management's last best offer. The latter notice must be adequate to give the union an opportunity to invoke the services of the Impasses Panel, should the union elect to do so. It takes little time for the union to do this. In the AFLC case, 5 FLRA 288 (1981), the Authority concluded that eight days' notice of intent to implement management's impasse position was sufficient.

It is customary for the parties to establish steward districts and for the union to designate those of its officials who are entitled to act as agents of the union in the

established districts. Where a proposed change in conditions of employment is limited to employees in a particular steward district, it is reasonable, in absence of negotiated arrangements and established practices to the contrary, to notify the steward servicing the district.

There is no requirement that the notice be in writing. Many proposed changes are quite straight forward, limited in impact (although nonetheless meeting the "substantial" impact test), and need to be implemented with dispatch. Notice and bargaining, if any, can be accomplished by means of a telephone call or a meeting--either a meeting called for the purpose or at a regularly scheduled union-management meeting. The greater the degree of formality in day-to-day transactions with the union, the longer it takes to complete the notice/bargaining process. Whether the parties find such informal dealings acceptable depends, in part, on the character of the relationships. Where there is mutual trust and where oral understandings are treated with the same deference as written agreements, the parties are apt to prefer informal dealings.

Once adequate notice is given to an appropriate union agent, the burden is on the union to request bargaining. *See* IRS, 2 FLRA 586 (1980). Union bargaining requests need not be accompanied by specific proposals. However, a general bargaining request should promptly be followed up with specific union proposals that directly relate to the proposed change. 5 FLRA 817 and 823 (1981).

(3) Bargaining Impasses. Management can unilaterally implement its last best offer provided that it gives the union notice of its intent to implement and union does not timely invoke the services of the Impasses Panel. (*See* Air Force Logistics Command, 5 FLRA 288 (1981).) The Authority will review the conduct of the parties to determine whether both parties negotiated in good faith to impasse and whether the union's failure to seek assistance constituted a clear and unmistakable waiver. Compare Michigan National Guard, 46 FLRA 582 (1992) with Lowry Air Force Base and AFGE Local 1974, 22 FLRA 171 (1986). Although the Panel, in 5 C.F.R. § 2470.2(e), defines an impasse as "that point in the negotiation of conditions of employment at which the parties are unable to reach agreement, notwithstanding their efforts to do so by direct negotiations and by the use of mediation or other voluntary arrangements for settlement," one should not infer that mediation is necessary. In this connection, *see* DOT, Denver, 5 FLRA 817 (1981), where the ALJ found that the parties had bargained to impasse after a brief discussion. In that case no reference was made to mediation. Nor can one say how long the parties must bargain before a bona fide impasse is reached. This will vary, depending on the number and nature of the items being negotiated. In DOT, Denver, a discussion taking less than an hour was sufficient. In SSA, Birmingham, 5 FLRA 389 (1981), the ALJ found that the parties had not bargained to impasse because they had only one bargaining session and there was no other evidence in the record indicating that the parties had exhausted bargaining.

It is OPM's position that management, in the context of impact and implementation bargaining, has the right to implement after bargaining in good faith to a

bona fide impasse, regardless of whether the services of the Impasses Panel are timely invoked, in order to comply with law or appropriate regulation and in order to exercise a retained management right in a timely fashion to meet mission requirements. For example, an agency may have determined it is necessary to relocate part or all of its work force geographically. If the parties reached impasse on impact and implementation matters, management should not be required to delay the moves pending Panel action, which could involve many months with its attendant costs. Such a position is bound to be controversial. In taking the position that management's rights include the right to implement without unreasonable delay when such delay can adversely affect mission accomplishment (as opposed to the delay of an individual disciplinary action), it must be emphasized that management has certain obligations. It has the duty to provide the union with the adequate notice and to afford it sufficient time to bargain on procedures and appropriate arrangements.

If a unilateral decision is made (one in which the union is not given notice or an opportunity to negotiate), the union frequently files an unfair labor practice charge for failure to negotiate in good faith [§ 7116(a)(5)]. Philadelphia Naval Shipyard, 15 FLRA 26 (1984).

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f. Impact and Implementation Bargaining.

Although certain agency decisions are not subject to bargaining, they may have a substantial impact on bargaining unit employees. As such, procedures for implementing these agency actions and arrangements for employees adversely affected are bargainable, even if the decision to take a specific course of action is not.

> *"Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency . . . [to exercise the listed management rights]". (5 U.S.C. § 7106(a)).*

> *Nothing in this section shall preclude any agency and any labor organization from negotiating--*
>
> *(1) [permissive topics];*
> *(2) procedures which management officials of the agency will observe in exercising any [management right]; or*
> *(3) appropriate arrangements for employees adversely affected by the exercise of any [management right] by such management officials. 5 U.S.C. § 7106(b)(2) and (3).*

The decisions themselves are not subject to bargaining because they involve the exercise of rights reserved to management by 5 U.S.C. § 7106. Moreover, the impact and implementation, or procedures and arrangements bargaining obligation arises only as the result of a management initiative -- *i.e.,* of a proposed action that has a substantial impact on the conditions of employment of bargaining unit employees. The difficulty arises because the distinction between procedure and substance is not always clear.

In Department of Health and Human Services, SSA, Chicago, 19 FLRA 827 (1985), the FLRA reiterated the rule that no duty to bargain arises from the exercise of a management right that results in an impact or a reasonably foreseeable impact on bargaining unit employees which is no more than de minimus. To aid in determining whether exercise of a right has only a de minimus impact several factors must be considered:

> . . . . the nature of the change (*e.g.,* the extent of the change in work duties, location, office space, hours, loss of benefits or wages and the like); the temporary, recurring or permanent nature of the change (*i.e.,* duration and frequency of the change affecting unit employees); the number of employees affected or foreseeably affected by the change; the size of the bargaining unit; and the extent to which the parties may have established through negotiation or past practice procedures and appropriate arrangements concerning analogous changes in the past . . . .

The Authority modified the de minimus test in HHS, Northeastern Program Service Center, 24 FLRA 403 (1986). In that case it held that the primary emphasis in applying the test would be placed on the nature and extent, or reasonably foreseeable effect, of the change on employees' conditions of employment. Further, the FLRA stated that it now considers the size of the bargaining unit irrelevant, and that it would consider the number of employees affected and the bargaining history only with a view toward expanding, not limiting, the number of situations in which bargaining would be required.

(1) Procedures to be observed by management in exercising its retained right -- Section 7106(b)(2). Limitations on Management Rights.

The "Implementation" area of negotiation -- Proposals Concerning "Procedures." Union proposals concerning the procedures which management officials will observe in exercising their management rights under § 7106(a) are negotiable. 5 U.S.C. § 7106(b)(2); DOD v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981) (proposal that no removals will be effected until all grievances completed was negotiable); AFGE and AAFES, 2 FLRA 153 (1979)(union proposal that no employee be removed or suspended before completion of review was negotiable).

The problem lies in determining which proposals deal with procedures affecting the exercise of a management right and which are substantive infringements on the management right.

Where the proposals are "purely procedural," the Authority applies the "Acting at All" test. Department of Interior v. FLRA, 873 F.2d 1505 (D.C. Cir. 1989) (proposal to delay suspensions for 10 days). AFGE and Department of Education, 36 FLRA 130 (1990) (proposal to delay adverse action until all appeals have been exhausted). The issue is: Does the proposal prevent management from acting at all?

In those cases where the proposal is not as clearly procedural in nature, the Authority applies the "Direct Interference" test. Aberdeen Proving Ground v. FLRA, 890 F.2d 467 (D.C. Cir. 1989) (union proposal concerning procedure for establishing legitimate drug use in employees who test positive for drugs was found to be a negotiable procedure). The issue is: Does the proposal directly interfere with the agency's exercise of a management right?

History. This exception to management rights was found in the Executive Orders leading up to the Civil Service Reform Act. Although management, under E.O. 11491, retained its decision making and action authority respecting certain rights, it nonetheless had to bargain on procedures it would follow in exercising its rights. There was, however, an important caveat; the procedures could not be such as to "have the effect of negating the authority reserved." (*See* VA Research Hospital, 1 FLRC 227, 230, where the Council held that a proposed promotion procedure was negotiable because it did not "appear that the procedure proposed would unreasonably delay or impede promotion selections." The "unreasonable delay" standard was forcefully restated in the Blaine Air Force Station case, 3 FLRC 75, 79, where the Council said that a right reserved to management "includes the right . . . to accomplish such personnel actions promptly, or stated otherwise, without unreasonable delay." [Emphasis in original.]

The Order's "unreasonable delay" standard was challenged in the IRS, New Orleans case, 1 FLRA 896 (1979)--the second negotiability decision issued under the Statute. In that case a provision outlining a procedure management would follow in deciding whether to permit revenue officers to work from their homes was disapproved by the agency on the ground it came into conflict with section 7106(a). The Authority, relying upon a joint explanatory statement of the House-Senate Conference Committee, concluded that "procedures" were fully bargainable except where they prevented management from "acting at all." Finding nothing in the disputed provision preventing management from "acting at all," the Authority set aside the agency's allegation.

The following case discusses the issues that arise under the current statute.

AFGE, COUNCIL OF PRISON LOCALS, LOCAL 3974 and FEDERAL BUREAU OF PRISONS, MCKEAN, PENNSYLVANIA

48 F.L.R.A. 225; (1993)

(Extract)

I. Statement of the Case

This case is before the Authority on a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). The appeal concerns the negotiability of a proposal that requires the Agency to give employees preference in filling vacancies before hiring from any other source. We find that the proposal is nonnegotiable because it directly interferes with management's right under section 7106(a)(2)(C) of the Statute to make selections for appointments and it does not constitute an arrangement within the meaning of section 7106(b)(3).

* * *

III. The Proposal

In order to enhance career advancement opportunities for Federal Bureau of Prisons employees, the parties agree that current employees will be given first consideration for all vacancies. In addition to being first consideration [sic] the parties agree that where all qualifications are relatively equal the Federal Bureau of Prisons employee will be given preference before hiring from any other source.

IV. Positions of the Parties

The Agency contends that this proposal directly interferes with its management right to make selections from any appropriate source under section 7106(a)(2)(C)(ii) of the Statute. The Agency argues that the proposal would require consideration of Bureau of Prisons employees before outside applicants could be considered for vacancies at the Federal Correctional Institution, McKean, Pennsylvania. According to the Agency, under the proposal it could select an outside candidate only when the qualifications of that candidate were more than "relatively equal" to any Bureau of Prisons applicant. The Agency asserts that under Authority precedent, proposals that prevent an agency from giving concurrent consideration to outside applicants directly interfere with management's right to select from any appropriate source.

The Agency also contends that this proposal does not constitute a negotiable arrangement under section 7106(b)(3) of the Statute. The Agency maintains that the proposal is not an "arrangement" because it

does not address adverse effects flowing from the exercise of a management right, but, rather, seeks to create a benefit for employees. The Agency contends that, even assuming that the proposal were an arrangement, it is not "appropriate" because it excessively interferes with the exercise of management's right to make selections for appointments from any appropriate source. In this regard, the Agency argues that this proposal would prevent it from selecting an outside candidate for a vacancy except in narrow circumstances and that this limitation would serve to discourage the Agency from surveying appropriate sources for the most qualified candidate. In particular, the Agency contends that this proposal would inhibit its ability to recruit candidates from underrepresented groups pursuant to affirmative action plans. Relying on Nuclear Regulatory Commission v. FLRA, 895 F.2d 152 (4th Cir. 1990) and American Federation of Government Employees, Local 1923 and U.S. Department of Health and Human Services, Health Care Financing Administration, Baltimore, Maryland, 44 FLRA 1405, 1488 (1992) (Health Care Financing Administration), the Agency asserts that this proposal is not negotiable under section 7106(b)(3) of the Statute.

The Union concedes that this proposal directly interferes with management's right to select from any appropriate source under section 7106(a)(2)(C) of the Statute. However, the Union contends that the proposal does not excessively interfere with that right and is negotiable under section 7106(b)(3) as an appropriate arrangement. The Union states that under the proposal, the Agency may select from an "outside" source "at anytime" [sic] as long as the outside candidate has better qualifications than candidates who are already employed by the Bureau of Prisons. Response at 2. According to the Union, this proposal benefits current employees by providing them with increased career advancement opportunities. The Union argues that denial of the proposed benefit would adversely affect current Bureau of Prisons employees by restricting their "upward mobility." Id. at 3. In response to the Agency's argument concerning its ability to hire candidates from underrepresented groups, the Union contends that the proposal would present no impediment to such recruitment because the qualifications of internal candidates would not be "relatively equal" to that of the candidate from an underrepresented group. Id.

V. Analysis and Conclusions

As the Union acknowledges, this proposal directly interferes with management's right to select employees for appointments in filling positions under section 7106(a)(2)(C) of the Statute. That management right reserves to the agency the discretion to determine the source from which it will make a selection. *See, for example*, Defense Mapping Agency, Louisville, 45 FLRA at 78. It also reserves to the agency the discretion to determine which candidates are better qualified than others

when considering candidates for selection when filling a vacancy. *Id*. Thus, a tie-breaking procedure is negotiable if management is able to determine the source from which it will select and whether candidates are equally qualified for the position. *See, for example*, Overseas Education Association, Inc. and Department of Defense Dependents Schools, 29 FLRA 734, 793 (1987) (proposal that required the agency to use seniority as a tie-breaker if management determined that two or more employees were equally qualified and where management had determined to make the selection from one source, found negotiable because it did not interfere with management's right under section 7106(a)(2)(C) of the Statute), *aff'd as to other matters*, 872 F.2d 1032 (D.C. Cir. 1988). This proposal would prevent the selection of an outside candidate for a vacancy unless that candidate was better qualified than any candidates who were currently Bureau of Prisons employees. Consequently, it directly interferes with management's right to make selections for appointments in filling positions.

Now we turn to the question of whether this proposal is negotiable under section 7106(b)(3) as an appropriate arrangement notwithstanding the fact that it directly interferes with a management right. In National Association of Government Employees, R14-87 and Kansas Army National Guard, 21 FLRA 24, 29-33 (1986) (Kansas Army National Guard), the Authority developed a framework to determine whether a proposal constitutes an appropriate arrangement within the meaning of section 7106(b)(3) of the Statute. Under that framework, we determine whether the proposal is intended as an arrangement for employees who may be adversely affected by the exercise of management's rights. If we find that the proposal is intended as an arrangement, we determine whether that arrangement is appropriate or whether it excessively interferes with the exercise of management's right to make selections for appointments in filling positions.

Applying the framework established in Kansas Army National Guard, we find that this proposal does not constitute an arrangement within the meaning of section 7106(b)(3) of the Statute. In order for us to conclude that a proposal is intended as an arrangement under section 7106(b)(3), the record must demonstrate that the proposal seeks to mitigate the adverse effects on employees of the exercise of a management right. . . . *Id*. at 31. Thus, a proposal is not an arrangement merely because employees would be adversely affected by the denial of a benefit provided by the proposal. *See* Border Patrol, 46 FLRA at 960; National Treasury Employees Union and U.S. Department of the Treasury, Office of Chief Counsel, Internal Revenue Service, 45 FLRA 1256, 1258-59 (1992).

This proposal seeks a benefit for employees. The adverse effects that the Union identifies in support of its claim that this proposal

constitutes an appropriate arrangement flow from the denial of the benefit sought. It is not apparent from the record that the proposal otherwise seeks to ameliorate adverse effects that flow from the exercise of a management right. Compare, for example, Kansas Army National Guard (the Authority concluded that a provision requiring that when filling specified vacancies management must select an employee who had been demoted through reduction-in-force and, thus, adversely affected by the exercise of a management right constituted an appropriate arrangement under section 7106(b)(3)). Consequently, we conclude that this proposal is not an arrangement for employees adversely affected by the exercise of a management right within the meaning of section 7106(b)(3) of the Statute. In view of this conclusion, it is not necessary to determine whether the proposal excessively interferes with management's right to make selections under section 7106(a)(2)(C) of the Statute.

Accordingly, the proposal is nonnegotiable.

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(2) Appropriate arrangements for employees adversely affected--Section 7106(b)(3).

The prior case ends with a discussion of whether the union proposal constitutes an appropriate arrangement. The FLRA adopted the "excessive interference" test to determine the negotiability of a proposed appropriate arrangement which interferes with the exercise of a management right. *See* Kansas Army National Guard, 21 FLRA 24 (1986). The test and important factors are listed below:

(1) Does the union proposal concern an arrangement for employees detrimentally affected by management's actions? If not, then the proposal is not an appropriate arrangement within the meaning of section 7106(b)(3). *See* AFGE and. Alaska NG, 33 FLRA 99 (1988).

(2) If so, the FLRA will then determine whether the arrangement is appropriate, or inappropriate because it excessively interferes with management rights. Some factors to consider:

(a) What conditions of employment are affected and to what degree?

(b) To what extent are the circumstances giving rise to the adverse affects within the employees' control?

(c) What is the nature and extent of impact upon management's ability to deliberate and act pursuant to its statutory rights?

(d) Does the negative impact on management rights outweigh any benefits to be derived from the proposed arrangement?

(e) What is the effect on effective and efficient government operations?

If, after applying this test, implementation of the union proposal would excessively interfere with the exercise of management's reserved rights, the proposal is nonnegotiable.

The excessive interference test may not normally be applied to government-wide regulations. An exception would be when government-wide regulations restate section 7106 rights. OPM v. FLRA, 864 F.2d 165 (D.C. Cir. 1988).

Management must carefully examine union allegations to ensure that the union has articulated an adverse effect. In IRS v. FLRA, 960 F.2d 1068 (D.C. Cir. 1992) the agency and union had entered into an agreement that employees would be paid extra if detailed to a higher graded position for more than one pay period. When management regularly assigned employees to temporary details of less then one period, the union proposed a provision that would prevent details for less than one pay period to avoid paying the higher wages. When the FLRA found this was not excessive interference, the court reversed, finding that the detail was a benefit and that the mere denial of a benefit was not an adverse affect warranting application of the excessive interference test.

In those instances when an adverse effect is found, the appropriate arrangement must be tailored to redress only the employees affected. In Interior Minerals Management Service v. FLRA, 969 F.2d 1158 (D.C. Cir. 1992) the court found union proposals concerning implementation of a drug testing program to be inappropriate. The proposals dealt with all employees when the only employees adversely affected were the few who would test positive for drugs.

4.4 Approval of the Collective Bargaining Agreement.

Upon completion of negotiations, both parties will sign the agreement and it will be forwarded to higher headquarters for review. Section 7114(c) provides:

(c)(1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable,

law, rule or regulation (unless the agency has granted an exception to the provision).

(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representation subject to the provisions of this chapter and any other applicable law, rule, or regulation.

The purpose of the statutory provision is to ensure the effective time of the new contract is not held in abeyance pending higher headquarters' approval. The review of the contract could continue indefinitely so that without this statutory provision, implementation of the contract could be unreasonably delayed. With it, the contract becomes effective on the 31st day after execution regardless of the promptness of the higher headquarters' review of the CBA.

Can the head of the agency disapprove any and all provisions of the contract and force the parties to return to the bargaining table to renegotiate the discovered clauses? The answer is "no." Once the contract is signed at the installation, all provisions, with the exception discussed below, become effective upon the agency head's approval or on the 31st day after execution, whichever is sooner.

However, if a contract clause is contrary to statute (to include the management rights section or any other section of the CSRA), rule or government-wide regulation, the clause is void. The remainder of the contract will go into effect and those clauses will be renegotiated or deleted.

Higher headquarters power to review collective bargaining agreements for compliance with law and appropriate level regulations extends to contract provisions imposed by the Federal Service Impasses Panel, Interpretation and Guidance, 15 FLRA 564 (1984). *See also* Pacific Missile Test Center, Point Mugu, California, 8 FLRA 389 (1982).